TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 649.

FREDERICK LANG, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW JERSEY.

IN ERROR TO THE COURT OF PRESS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED MARCH 4, 1898.

(21,000.)

(21,052.)

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a New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, Defendant in Error,
v.
FREDERICK LANG, Plaintiff in Error.

On Error to Supreme Court.

Case.

For the State: George Berdine, Prosecutor. Aaron V. Dawes, of Counsel.
For the Defendant: Alan H. & Theo. Strong.

NEW JERSEY, *ss:*

[SEAL.] The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting:

For as much as in the record and proceedings and also in the giving of judgment in a certain plaint which was in our Supreme Court of Judicature before you, between the State of New Jersey, Defendant in Error, and Frederic Lang, Plaintiff in Error, upon a writ of error directed to the Court of Oyer and Terminer of
b the County of Middlesex, to review a conviction in said Court of Oyer and Terminer of the said Frederick Lang, upon an indictment for murder in the first degree, manifest error hath intervened to the great damage of the said Frederick Lang as is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed then you distinctly and openly send under your seal the record and proceedings aforesaid with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes at Trenton on the twenty-fifth day of June, instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to law ought to be done.

Witness, William J. Magie, Esquire, Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the nineteenth day of June, nineteen hundred and seven.

S. D. DICKINSON, *Clerk.*

ALAN H. & THEO. STRONG,
Attorneys for Plaintiff in Error.

Allowed June 19th, 1907.

W. J. MAGIE, *C.*

Filed June 20th, 1907.

S. D. DICKINSON, *Clerk*

The Answer of the Justices of the Supreme Court of the State of New Jersey Within Named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed as within we are commanded.

WM. S. GUMMERE, [SEAL.]

c New Jersey Supreme Court.

THE STATE OF NEW JERSEY, Defendant in Error,
v.
FREDERICK LANG, Plaintiff in Error.

On Error to Middlesex Oyer and Terminer.

(*Affirmance and Remittitur.*)

This cause having been duly argued at the February Term of this Court by Alan H. Strong, Esq., of counsel for plaintiff in error, and George Berdine, Prosecutor of the Pleas for the defendant in error, and the Court having considered the same, and finding no error in the record or proceedings in the Supreme Court.

It is thereupon ordered and adjudged that the judgment of the Court of Oyer and Terminer of the County of Middlesex, removed by the writ of error in this cause be affirmed; and that the record be remitted to the said Court of Oyer and Terminer of Middlesex County to be proceeded with in accordance with the judgment and practice of said Court.

Dated June 15, 1907.
Entered June 15, 1907.
On motion of

GEORGE BERDINE,
Prosecutor and Attorney for Defendant in Error.

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said Court in the above stated cause and entered in the minutes thereof.

In testimony whereof I have set my hand and the
[SEAL.] seal of said Court at Trenton, this twentieth day
d of June, A. D. nineteen hundred and seven.

WM. RIKER, JR., *Clerk.*

(The original record of proceedings at the trial is also returned with said writ and marked "Filed June 20, 1907. S. D. Dickinson, Clerk.")

New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, Defendant in Error,
v.
FREDERICK LANG, Plaintiff in Error.

On Error to Supreme Court.

Assignment of Errors.

[Filed July 2, 1907.]

And now on this twenty-fifth day of June, in the year nineteen hundred and seven, before the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes, comes the said Frederick Lang, plaintiff in Error, by Alan H. & Theodore Strong, his attorneys, and says that in the record and proceedings and also in the giving of judgment in the Supreme Court upon the writ of error issued out of said Court to the Court of Oyer and Terminer of the County of Middlesex, at the suit of the said Frederick Lang, there is manifest error in this:

1. That judgment upon the said writ of error was given in favor of the State of New Jersey and against the said defendant, Frederick Lang, affirming the judgment of the said Court of Oyer and Terminer, whereas judgment should have been given in favor of the said Frederick Lang, reversing the said judgment of the said Court of Oyer and Terminer.

2. And in this, that by the affirmance of said Supreme Court of the said judgment of the Court of Oyer and Terminer the said Frederick Lang, defendant, has been denied the equal protection of the laws, and has been adjudged to be deprived of his life and liberty without due process of law (contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, upon which the said defendant relies in this behalf), in that the indictment upon which he was convicted of murder in the first degree in the said Court of Oyer and Terminer was found by a grand jury empaneled before the commission of the said alleged offence, two members of which said grand jury, namely, Hezekiah Warne and Isaac S. Bennett, sworn and empanelled as aforesaid prior to the alleged commission of said offence, were at the time of being so sworn and empaneled, above the age of sixty-five years, and therefore not qualified to serve as members of the said grand jury, and the said defendant by reason of the said grand jury and the said members thereof having been sworn and empaneled before the alleged commission of said offence, had no opportunity to challenge said persons, and although the said defendant duly moved to quash the said indictment in the said Court of Oyer and Terminer upon the ground of said two members of said grand jury having been as aforesaid above the lawful age for such service and afterwards pleaded the said facts in abatement of the said indictment, said

motion to quash and plea in abatement were respectively denied and overruled by the said Court of Oyer and Terminer, which action of the said Court of Oyer and Terminer was approved and held valid by the said Supreme Court by its affirmance of said judgment, notwithstanding the complaint thereof by the said Frederick Lang upon his said writ of error in said Supreme Court.

Wherefore, because of the said errors and of other errors
f appearing in the said record and proceedings, the said Frederick Lang, plaintiff in error, prays that the judgment of the said Supreme Court and also the judgment of the said Court of Oyer and Terminer of the County of Middlesex may be reversed, annulled and for nothing holden, and that he may be restored to all things that he has lost on occasion of said judgment.

ALAN H. & THEODORE STRONG,
Attorneys for Plaintiff in Error.

New Jersey Supreme Court.

THE STATE
v.
FREDERICK LANG.

On Error to Middlesex Oyer and Terminer.

Argued before Gummere, Chief Justice, and Justices Garretson and Reed.

For the plaintiff in error, Alan H. Strong.

For the State, George Berdine.

The opinion of the Court was delivered by GUMMERE, *Chief Justice:*

The plaintiff in error was tried and convicted in the Middlesex Oyer and Terminer upon an indictment charging him with the murder of one Katie Gordon, and the jury, by its verdict, fixed the grade of his crime as murder in the first degree. The entire record of the proceedings had at the trial has been returned with the writ as provided by the 136th section of the Criminal Procedure act of 1898.

The first and second causes of reversal challenge the correctness of the ruling of the trial court in sustaining a demurrer to a plea
in abatement filed by the defendant, and in overruling a
g motion to quash the indictment. Both the plea and the motion were rested upon the same proposition, viz.: that the indictment was not found by a lawfully constituted grand jury, because two of the members of that body were over sixty-five years of age.

By the provision of our statute which prescribes the qualifications of grand jurors it is enacted that "Every person summoned as a grand juror in any court of this State shall be a citizen of this State, and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years;

and if any person who is not so qualified shall be summoned as a grand juror it shall be good cause of challenge to any such juror; provided that no exception to any such juror on account of his citizenship or age shall be allowed after he has been sworn or affirmed. "*Gen. Stat.* 1853, *Section* 6." It appears upon the face of the indictment that the crime charged against the defendant was committed by him while the grand inquest was in session. He was, therefore, debarred by the statute from interposing a challenge to any of its members on account of age; and the basis of his plea in abatement and of his motion to quash, is that the deprivation of this right—which is afforded to all persons who are charged with violations of the criminal law which have occurred prior to the impanelling of the grand jury—is a denial of that equal protection of the laws which is guaranteed to every person by the Fourteenth Amendment to the Federal Constitution.

It is settled in this State that the improper composition of a grand jury will not constitute a ground for a plea in abatement. The remedy in such case is to challenge before indictment found, or to move to quash afterward. *Gibbs and Stanton vs. State*, 16 *Vr.* 379; *S. C. on Error*, 17 *Vr.* 353. And where the defendant has had an opportunity to challenge a grand *jury* before he is sworn, and has neglected to avail himself of it, he cannot afterward take advantage of the lack of qualification of such grand juror by a motion to quash the indictment. *State vs. Hoffman*, 42 *Vr.* 285.

h The ruling of the trial court, therefore, sustaining the demurrer to the plea in abatement was proper, under the cases cited, for the reason that the defendant was not entitled to question the legality of the grand jury by such a plea. But, as he had been afforded no opportunity to interpose a challenge to either of the members of that body who were over the age of sixty-five years, he was entitled to attack the legality of the body by a motion to quash, and the determination of the propriety of the action of the trial court in overruling that motion requires a consideration of the meritorious question presented thereby.

The proposition that the cited provision of our jury act is violative of the Fourteenth Amendment of the Federal Constitution because it does not afford to all persons charged with crime equal protection, seems to us to be unsound. The reason why the legislature has seen fit to confer upon a person who is charged with a criminal offence, the privilege of challenging a grand juror who is over sixty-five years of age, provided the challenge is interposed before the grand juror is sworn, is not easy to understand. It is plain, however, that it was not for the purpose of protecting the alleged criminal against an unfounded indictment, for the legislature, by providing that, after such grand juror is sworn, he shall be as fully qualified to serve as if he had been under the stated age, has recognized that advancing years is no ground for imputing lack of impartiality to a citizen who is drawn for grand jury service. We are not able to perceive, nor has counsel pointed out to us, how the privilege of interposing a challenge on such ground, affords any "protection," within the meaning of the Federal Constitution, to a person charged

with crime. But, assuming that some benefit is conferred by the privilege to those persons whose alleged violations have antedated the impanelling of the grand jury, and that the benefit is not shared in by those who are charged with having committed crimes while the grand jury is in session, the fact that the latter class are
i not permitted to share in the benefit does not constitute a violation of the equal protection clause of the Fourteenth Amendment. As was declared by the Supreme Court of the United States in *Hayes vs. Missouri,* 120 *U. S.* 68, that provision "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, *under like circumstances and conditions,* both in the privileges conferred and in the liabilities imposed." It was this view of the scope of the provision which lead the same tribunal, in the case of *Missouri v. Lewis,* 101 *U. S.* 22, to hold that it was not violated by a statute which permitted an appeal from the final judgment of certain of the Circuit Courts of the State of Missouri, and denied it as to judgments rendered by others of such courts; and which led to the conclusion in *Brown v. New Jersey,* 175 *U. S.* 172, that the Amendment did not prohibit a state from enacting that in a criminal trial had before a struck jury, the defendant should be entitled to only five peremptory challenges, although ordinarily on the trial of indictments the right to twenty peremptory challenges was given. Our act prescribing the qualification of grand jurors treats alike all persons charged with crime, *under like circumstances and conditions.* The province of the grand jury is to make diligent inquiry concerning all alleged violations of the criminal law, not only those which have occurred before its organization, but those which have occurred during its session. *All* persons who have been charged with violating the law prior to the organization of the grand jury are granted the privilege of challenging a grand juror, who is over sixty-five years of age; the privilege is denied to all persons who are charged with having committed a crime during the sitting of the grand jury. The defendant in error was not denied the equal protection of the laws in not being afforded an opportunity to chalienge the two members of the grand jury referred to in his motion to quash, and the trial court, therefore, was guiity of no error in overruling that motion.

j But if our consideration of the question had led us to the conclusion that the criticism upon the indictment was well founded, and that there was error in the refusal to quash, we nevertheless, would not be justified in reversing this judgment on that account. In the case of *Gibbs and Stanton vs. State, supra,* where the defendant sought to reverse a conviction upon a similar ground, this court—after pointing out that, under the legal system which has prevailed in this State since the amendment of the 89th section of the Criminal Procedure act in the year 1855, no error, either of substance or form will work the reversal of a criminal judgment, unless it is of such a nature that it either did, or might have, prejudiced the defendant on the trial of the cause—sustained the judgment then

under review, on the ground that, as the conviction of the defendants was upon their own confession, it was undeniable that the alleged imperfections in the preliminary proceedings could not have prejudiced them upon their trial. The section of the act of 1855 referred to in the cited case, is to the effect that no judgment given upon any indictment shall be reversed "for any error except such as shall, or may, have prejudiced the defendant in maintaining his defense upon the merits." The 136th section of the Criminal Procedure act of 1898, under which the present review is had, contains the provision of the act of 1855 *in haec verba,* and the question is, therefore, presented for determination, whether the imperfections in the preliminary proceedings could have prejudiced the defendant in maintaining his defense upon the merits. The verdict of the jury declaring the guilt of the defendant is as decisive of the truth of that fact, when based upon a consideration of all the proofs submitted, as when based upon the admission of the defendant himself. That being so (to repeat the declaration in Gibbs and Stanton *vs.* State), "It is consequently undeniable that the alleged imperfections in the preliminary proceedings could not have prejudiced the defendant upon his trial."

The next ground of reversal attacks the action of the trial court in excusing one Charles Jackson from service as a juror. It appeared, from the examination of the juror on his *voir dire,* that he was a member of the National Guard of the State, and that his regiment was then in camp at the State camp grounds at Sea Girt. Upon this fact appearing he was excused from service by the court of its own motion. That the trial court has power to discharge a juror who is drawn in a criminal case, provided reasonable cause exists for such judicial action, is fully settled in this State. *Patterson vs. State.* 19 *Vr.* 381; *Aaronson vs. State,* 27 *Vr.* 9. Counsel urges before us that in the present case no reasonable cause existed for excusing the juror, and that, therefore, the action of the court was not justified under the cases cited. Matters of this kind arising during the course of the trial, must necessarily be left largely to the discretion of the trial judge, and, unless it be made plain that he has abused his discretion, and that the defendant may have suffered injury thereby, the propriety of his action cannot be challenged upon review. In the present case not only was there no abuse of judicial discretion, but, on the contrary, the excusing of the juror from service was eminently proper under the conditions disclosed.

The next cause of reversal is directed at the instruction of the court to the jury as to the constituents of the crime of murder of the first degree; the contention being that there was error in what was said to the jury upon the subject of deliberation and premeditation. The court charged as follows: "Murder in the first degree consists in the taking of human life with intent to kill, and that intent must be executed with deliberation and premeditation; it is not necessary that that deliberation and premeditation should continue for an hour, or even for a minute; it is enough that the design to kill be fully formed and purposely executed. You will see, therefore, that the two important elements necessary to constitute the crime of murder in the

first degree are, an intent to kill, and the execution of that intent with deliberation and premeditation. I do not know that I
l can define those words better than they define themselves. Deliberation and premeditation imply a weighing of the matter and a forethought with regard to the matter; but, as I have stated that weighing of the matter, and that forethought, need not be for an hour, or even a minute." The *ground* of objection to this instruction is that the court, by declaring that "it is enough that the design to kill be fully formed and purposely executed," eliminated the necessity for deliberation, notwithstanding that the fact that the court had previously instructed the jury that, in order to constitute the crime of murder in the first degree the intent to take life must be executed with deliberation and premeditation. It is enough, in disposing of this attack upon the charge, to say that the definition complained of has received the approval, not only of this court, but of the Court of Errors and Appeals, in every case in which it has been submitted for consideration since the decision in *Donnelly vs. State,* 2 *Dutch.* 601, and that it is no longer properly open to criticism.

The next cause of reversal is directed at an alleged error of the trial court in refusing to stop the Prosecutor of the Pleas, in his summing up to the jury, upon the application of the defendant. The language complained of was that the defendant was "a monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted, and cowardly when caught." The evidence submitted to the jury showed that the defendant was the uncle of the girl whom he killed, a brother of her mother; it was fairly to be inferred from the proofs that he desired to marry her, notwithstanding the fact that a marriage between them would have been incestuous, and that if this could not be accomplished he desired to have her submit herself to his embraces, without the sanction of a marriage ceremony. The proofs also fairly support the inference that he killed her because she refused to submit herself to his wishes. In view of these facts it seems to us that the prosecutor was within
m his privilege in making the statement which was objected to. It is necessary for the proper administration of justice that, in the summing up to the jury, counsel shall be given the widest latitude, within the four corners of the evidence, and, so long as he confines himself to the evidence, what is said by him in its discussion by way of comment, denunciation or appeal, affords no ground for exception. *State vs. Barker,* 39 *Vr.* 19.

The last cause for reversal assigned is that the verdict is not sustained by the evidence. A reference to the decision of the Court of Errors and Appeals in the case of *State vs. Jaggers,* 42 *Vr.* 281, is all that is necessary for the disposition of this point. It is there pointed out that under the 136th section of the Criminal Procedure act, as originally passed in 1894, the court of review was required to examine the evidence for the purpose of determining whether or not it justified the verdict of the jury; but that since the amendment of that section by the revision of 1898, that duty was no longer required of the reviewing tribunal. It is contended by counsel, in his argument, that the certification by the trial judge of the entire rec-

ord of the proceedings had upon the trial, is practically the same as if this court had issued its certiorari to the Oyer and Terminer to send up the evidence in the cause. He refers to a suggestion to that effect, made by the court in *State vs. Hummer*, 65 *Atl. Rep.* 249; and the argument based upon this suggestion is that the court, having before it the evidence, ought to examine it for the purpose of determining whether it justifies the verdict of the jury. It seems to us, however, that the certification of the proceedings before it, made by the Oyer, cannot be treated as a writ of certiorari. To so hold would be to declare that the legislature could confer the certiorari power upon the Court of Oyer and Terminer, or rather, upon a convicted defendant, for the certification provided by the statute is not left to the discretion of the court which makes it, but to the defendant who sues out the writ of error to review the judgment against him.

We conclude, upon an examination of all the matters pre-
n sented to us on the reasons for reversal, and by the assign-
ments of error, that the conviction under review should be affirmed.

In response to a certiorari for that purpose issued out of the Court of Errors and Appeals upon allegation of diminution the following proceedings have been sent up by the Supreme Court.

1 New Jersey Supreme Court.

THE STATE OF NEW JERSEY, Defendant in Error,
v.
FREDERICK LANG, Plaintiff in Error.

On Indictment for Murder.

On Error to Middlesex Oyer and Terminer.

Case.

Alan H. & Theo. Strong, For Plaintiff in Error.
George Berdine, Prosecutor, For Defendant in Error.

Order for Writ of Error.

Application having been made to me by counsel on behalf of Frederick Lang, upon due notice to George Berdine, Esquire, Prosecutor of the Pleas of the County of Middlesex, for a writ of error as hereinafter mentioned, and it appearing that said application should
be granted, it is hereby ordered that a writ of error do issue
2 out of the Supreme Court, directed to the Court of Oyer and Terminer of the County of Middlesex, to review the conviction of murder in the first degree and judgment of death thereupon

pronounced against the said Frederick Lang in the said Court of Oyer and Terminer.

Dated August 10th, 1906.

W. J. MAGIE, *C.*

On motion of
ALAN H. & THEO. STRONG,
Attorneys for Fred'k Lang.

Entered August 11, 1906.

NEW JERSEY, *ss:*

[SEAL.] The State of New Jersey to the Judges of the Court of Oyer and Terminer in and for the County of Middlesex, Greeting:

Forasmuch as in the record and proceedings and also in the giving of judgment upon a certain indictment against Frederick Lang for murder, which was before you in our said Court of Oyer and Terminer in and for the County of Middlesex, whereof the said Frederick Lang has been convicted by a certain jury of the County, taken between the State of New Jersey and the said Frederick Lang, manifest error hath intervened to the great damage of the said Frderick Lang as by his complaint we are informed; we being willing that the said error, if any there be, should in due manner be corrected and that full and speedy justice be done to him the said Frederick Lang in this behalf, do command you that if judgment be thereupon given then you do distinctly and openly send under your seal the record and proceedings aforesaid, including the entire record of the procedings had upon the trial of said cause, with all things touching the same, to our Justices of our Supreme Court of Judicature at Trenton on the first Tuesday of November next,
3 together with this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon for correcting that error what of right and according to the laws and customs of the State of New Jersey shall be proper to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our said Supreme Court, at Trenton, the eleventh day of August, in the year nineteen hundred and six.

WM. RIKER, JR., *Clerk.*

ALAN H. & THEO. STRONG,
Attorneys for Plaintiff in Error.

Presented to me this 13th day of August, 1906. Let the clerk make return.

F. J. SWAYZE, *Judge.*

The Answer of Francis J. Swayze, Esquire, Judge of the Court of Oyer and Terminer Within Named.

The record and proceedings of the plaint whereof mention is within named, with all things touching the same, I certify to the

Justices of our Supreme Court of the State of New Jersey at Trenton at the day and year within contained, in a certain schedule to this writ annexed, as I am commanded.

FRANCIS J. SWAYZE, *J. S. C.*

STATE OF NEW JERSEY, *Middlesex County, To wit:*

Be it remembered, that at a session of the Court of Oyer and Terminer, held at New Brunswick, in and for the said County of Middlesex, on the first Tuesday of April, in the year of our
4 Lord one thousand nine hundred and six, before the Hon. J. Franklin Fort, Esquire, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booream, Judge of the Court of Common Pleas, in and for the said County of Middlesex, the same being the April Term of the said Court of Oyer and Terminer in the year aforesaid, according to the form of the statute in that case made and provided, upon their oaths and affirmations, those who affirm having first alleged themselves conscientiously scrupulous of taking an oath, of James M. Parsons, James E. Berry, Joseph Mark, Henry E. Ayres, Hezekiah Warne, Frederick M. Townley, Isaac A. Bennett, Charles M. Davison, Alphonso L. Mundy, Edward E. Haines, Edward Jaques, Charles W. Hoagland, Walter A. Belcher, Charles Edward, Charles Fletcher, Adrian G. Chamberlin, Edward Van Pelt, Peter J. Young, John V. Hubbard, Thomas L. Slugg, Lemuel Stults, Charles E. Kelly, William H. Jameson, Heyman Shrogwitz, good and lawful men of the said County of Middlesex, duly summoned and then and there empanelled, sworn and affirmed, and charged to inquire in behalf of the State of New Jersey and for the body of the said County of Middlesex, it is presented in manner and form, to wit:

Middlesex Oyer and Terminer, April Term, 1906.

MIDDLESEX COUNTY, *To wit:*

The Grand Inquest for the State of New Jersey, and for the body of the County of Middlesex, upon their respective oaths and affirmations, those who affirm having first alleged themselves conscientiously scrupulous of taking an oath, present that Frederick Lang, late of the Township of Raritan, in said County of Middlesex, on the twentieth day of April, in the year of our Lord one thousand nine hundred and six, with force and arms at the Township of
5 Raritan aforesaid, in the county aforesaid, and within the jurisdiction of this Court, wilfully, feloniously and of his

malice aforethought did kill and murder one Katie Gordon, against the form of the statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

GEORGE BERDINE,
Prosecutor of the Pleas.

And afterwards, that is to say, at the same aforesaid session of the said Court of Oyer and Terminer (and General Jail Delivery), holden at New Brunswick aforesaid, in and for the County of Middlesex aforesaid, on Friday, the eighth day of June, in the year of our Lord one thousand nine hundred and six, as yet of said term of April of the said Court of Oyer and Terminer, before the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of New Jersey, and Theodore B. Booraem, Judge of the Court of Common Pleas in and for said County of Middlesex, here cometh the said Frederick Lang, under the custody of Andrew Church, Esquire, Sheriff of the said County of Middlesex (in whose custody in the jail of the county aforesaid, for the cause aforesaid, he, the said Frederick Lang, had been before committed), being brought to the Bar in his proper person by the said Sheriff, to whom he is here also committed.

And the said Frederick Lang, now here in his proper person, having heard the said Indictment and forthwith being demanded concerning the premises in the said Indictment above specified and charged upon him how he will acquit himself thereof, he saith, through the interpreter said, I did shoot that girl, and the Court directed that a plea be entered of not guilty thereof, and thereof for good and evil he puts himself upon the country.

And George Berdine, Esquire, Prosecutor of the Pleas of
6 the State in and for the County of Middlesex, who prosecutes for the said State of New Jersey, in this behalf does the like.

And afterwards, that is to say, at the same aforesaid session of the said Court of Oyer and Terminer, holden at New Brunswick aforesaid, and in and for the County of Middlesex aforesaid, on Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and six, as yet of the said Term of April of the said Court of Oyer and Terminer, before the said the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, Judge of the Court of Common Pleas in and for the County of Middlesex, cometh the said Frederick Lang, under the custody of Andrew S. Church, Esquire, Sheriff of the said County of Middlesex (in whose custody in the jail of the county aforesaid for the cause aforesaid, he the said Frederick Lang, had been before committed), being brought to the Bar here in his own proper person, by the said Sheriff, to whom he is here also committed.

And the said defendant, through his counsel, retracted his former plea of not guilty, and moved to quash the indictment, for reasons then and there shown. The Court, after hearing the testimony and arguments refused to grant the motion.

Thereupon the said Frederick Lang filed the following Plea in Abatement:

Middlesex Oyer and Terminer.

THE STATE OF NEW JERSEY
vs.
FREDERICK LANG.

On Indictment for Murder.

Plea in Abatement.

And the said Frederick Lang, defendant in his own proper person, comes and having heard the aforesaid Indictment read and
7 protesting that he is not guilty of the premises charged in the said Indictment, for the plea nevertheless says that he ought not to be compelled to answer the said Indictment, because he says, that by an Act of the Legislature of the State of New Jersey, entitled "An Act concerning juries" (revision), approved March twenty-seventh, eighteen hundred and seventy-four (and also by a certain other Act of the Legislature of said State, being a supplement to said first mentioned Act, which supplement was approved April twenty-first, eighteen hundred and seventy-six), it is among other things enacted that every person summoned as a Grand Juror in any Court of this State shall be a citizen of this State and resident of the County from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person who is not so qualified shall be summoned as a Grand Juror it shall be good of challenge to such juror, who shall be discharged upon such challenge being verified according to law or on his own oath of affirmation in support thereof, provided that no exception to any such juror on account of his citizenship or age or any other legal disability shall be allowed after he is sworn or affirmed, which said statutes remain in full force and unrepealed.

And this defendant says that at the Court of Oyer and Terminer in and for the County of Middlesex, in the term of April last past, the Sheriff of the County of Middlesex did summon and return Hezekiah Warne and Isaac Scudder Bennett to serve on the Grand Inquest of the County aforesaid, and as Grand Jurors in and for said County for the said Term of April last past; and that the said Hezekiah Warne and Isaac Scudder Bennett were by the Court aforesaid, at the term aforesaid, to wit: on the third day of April, in the year nineteen hundred and six, at New Brunswick, in said County, sworn to serve as Grand Jurors for the County aforesaid upon the Grand Inquest aforesaid, and did thereupon then and there during
8 all the Term of April, until the present time, serve as grand jurors on the Grand Inquest aforesaid, and did take part as said Grand Jurors in the investigation and consideration by said Grand Inquest of the charge against this defendant, upon which the said indictment is based and in said indictment set forth, and did

take part as such Grand Jurors in finding said indictment against this defendant, to be a true bill by the said Grand Inquest, that the said Hezekiah Warne and Isaac Scudder Bennett, at the time they were summoned, returned and sworn as aforesaid, and during all the time that they served as such Grand Jurors upon the Grand Inquest aforesaid, were not under the age of sixty-five years, but were and each of them then and there, and at the time of being so summoned, returned and sworn, over the age of sixty-five years, to wit: the said Hedekiah Warne was then, that is to say, at the time of being sworn as such Grand Juror, at the age of seventy-two years, and the said Isaac Scudder Bennett was then of the age of sixty-six years, and by reason thereof and by force of the statute aforesaid, they were not then and there qualified to be summoned, returned or sworn as such Grand Jurors upon the said Grand Inquest. And this defendant saith that the said Katie Gordon, whom it is charged in said indictment that this defendant on the twentieth day of April, in the year one thousand nine hundred and six, did kill and murder, came to her death on the said twentieth day of April in consequence of a wound received by her on said day, which wound is charged by the said State of New Jersey to have been inflicted by this defendant, and this defendant saith that the matter alleged against him in and by said indictment occurred, if at all, on the said twentieth day of April, in said year, and at no other time, and after the empanelling of the said Grand Inquest and after the swearing of the said Hezekiah Warne and Isaac Scudder Bennett as such Grand Jurors upon
9 the said Grand Inquest as aforesaid, and that at the time of the swearing of Hezekiah Warne and Isaac Scudder Bennett as such Grand Jurors upon the Grand Inquest as aforesaid, to wit: on the said third day of April, in the year nineteen hundred and six, no criminal complaint or prosecution had been made or was pending nor was there any cause of such complaint or prosecution or allegation or claim of such cause against this defendant, nor was there any matter which had then occurred to be presented before the Grand Inquest in which the said defendant was in any manner concerned or interested, and the said defendant had no right (not being then interested in any matter to be presented to said Grand Inquest) to challenge or except to the said Hezekiah Warne and Isaac Scudder Bennett, or either of them, before or at the time when they were sworn as such Grand Jurors upon the said Grand Inquest as aforesaid.

And this defendant saith that the said indictment found against this defendant on account of matter which occurred after the swearing of the said Grand Inquest and after the swearing of the said Hezekiah Warne and Isaac Scudder Bennett as such members thereof by the said Grand Inquest two members thereof, to wit: the said Hezekiah Warne and Isaac Scudder Bennett were disqualified by reason of being at the time of being sworn upon said Grand Inquest over the age of sixty-five years as aforesaid, and without this defendant having had any opportunity at any time to challenge or except to the said Grand Jurors on account of such disqualification, was and is contrary to and in violation of the constitution and laws of

the State of New Jersey in that behalf, and also was and is further contrary to and in violation of section one of the fourteenth amendment to the Constitution of the United States, in that the said indictment and the finding there in manner aforesaid under the circumstances aforesaid, was no due process of law, and also that in the equal protection of the laws was and is thereby denied to
10 this defendant. All of which the said defendant is ready to aver, verify and prove; wherefore he prays judgment of the said indictment and whether he shall be called or required further to answer the same, and he prays that said indictment may be quashed and that he may be dismissed the Court hereof and upon the premises.

And the said State of New Jersey, by George Berdine, Prosecutor of the Pleas, demurred to the plea of abatement of the defendant, Frederick Lang, upon the following grounds, to wit: that the said matters alleged therein are insufficient in law to abate the said indictment.

GEORGE BERDINE,
Prosecutor of the Pleas.

And thereupon all and singular the premises being seen and by the Court aforesaid, now here fully understood, it is considered that the said indictment is sufficient and that the said defendant, Frederick Lang, answer and plead over thereto.

And the said Frederick Lang now here in his proper person having heard the said indictment read and forthwith being demanded concerning the premises in the said indictment above specified and charged upon him how he will acquit himself thereof, did not answer, and the Court thereupon ordered that a plea of not guilty be entered, and thereof for good and evil he puts himself upon the country.

And George Berdine, Esquire, Prosecutor of the Pleas of the State in and for the County of Middlesex, for the State of New Jersey, in the behalf does the like.

Therefore let a jury therefrom here come, to wit: on Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and six, as yet of the Term of April, and at the same aforesaid session of the said Court of Oyer and Terminer, before the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B.
11 Booraem, Judge of the Court of Common Pleas in and for the said Court of Middlesex, of good and lawful men of the said County of Middlesex, by whom the truth of the matter may be the better known, and who are not of kin to the said Frederick Lang, to recognize upon their oath whether the said Frederick Lang be guilty of the murder in the indictment aforesaid above specified, or not guilty because as well the said George Berdine, Esquire, who prosecutes for the State of New Jersey in this behalf, as the said Frederick Lang have put themselves upon the said jury.

And now, to wit, on the said Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and six, at the

same aforesaid session of the said Court of Oyer and Terminer, holden at New Brunswick aforesaid, as yet of the said Term of April of the said Court of Oyer and Terminer, before the said the Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Theodore B. Booraem, Esquire, Judge of the Court of Common Pleas in and for said County of Middlesex, here comes as well the said George Berdine, Esquire, who prosecutes for the State of New Jersey in this behalf, and the said Frederick Lang in his own proper person under the custody of the said Sheriff as aforesaid.

And the jurors of the said jury, by the said Sheriff for this purpose empanelled and returned agreeably to the statute in such case made and provided, to wit:

John V. Tappen, Thomas J. Perrine, Josiah Maitland, George McDowell, Andrew Rowland, Samuel Lawrence, Frederick Van Deursen, Wesley Kempton, Andrew J. Wyckoff, Joseph Okerson, Richard Beekman, Leonard C. Smith, being called come, who being elected, chosen, tried and sworn to speak the truth of and concerning the premises, upon their oath say that the said Frederick Lang is guilty of murder of the first degree as above charged in manner and form as in and by said indictment is above alleged against him.

12 And upon this it is forthwith demanded of the said Frederick Lang if he hath or knoweth anything to say wherefore the said Justice and Judge as aforesaid, here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him, who nothing further saith unless as he before had said.

Whereupon all and singular the premises being seen, and by the said Justice and Judge as aforesaid here fully understood. It is considered by the Court here that the said Frederick Lang be taken to the jail of the said County of Middlesex, from whence he came, and that he be there kept in strict custody until Tuesday, the twenty-eighth day of August next ensuing, and that between the hours of eight and ten in the forenoon of that day he be taken to the place of execution, to be provided by the Sheriff of the County of Middlesex, in accordance with the law, and there to be hanged by the neck until dead.

FRANCIS J. SWAYZE, *Judge.*

13 Middlesex Oyer and Terminer.

THE STATE
vs.
FREDERICK LANG.

Indictment for Murder.

NEW BRUNSWICK, N. J., *July* 16, 1906.

Testimony and Proceedings at the Trial, Before Honorable E. J. Swayze, Judge, and a Jury.

Appearances.

For the State—Prosecutor George Berdine.
For Defendant—Alan H. & Theodore Strong.

Mr. STRONG: If the Court please, I desire to withdraw the plea of not guilty and make a motion to quash the indictment.

The COURT: I will hear you. The plea may be considered withdrawn for that purpose.

Mr. STRONG: I wish to call a witness, Mr. Hezekiah Warne.

The COURT: On motion to quash, Mr. Strong?

Mr. STRONG: Yes, sir.

HEZEKIAH WARNE, sworn.

The PROSECUTOR: Shouldn't we have the basis of the motion?

The COURT: That is a novel practice to me. I will hear the question now.

14 Mr. STRONG: Does your Honor wish me to proceed with the question?

The COURT: I don't know what your aim is, Mr. Strong. You may ask a question.

By Mr. STRONG:

Q. You were a member of the Grand Jury at the present April Term of this Court?

A. A little louder.

Q. You are a member of the Grand Jury at the present April Term?

A. Yes.

The PROSECUTOR: I object to this.

The COURT: What is the object?

Mr. STRONG: The object is to prove that this Grand Juror, at the time he was sworn and impanelled on the Grand Jury was over the age of sixty-five years, and that he participated in the investigation of the complaint and finding of the indictment. It should be called to your Honor's attention in connection with this examination that

the Grand Jury was impanelled on the third of April—that appears by the minutes—and that the offense charged against this defendant occurred—the acts which are charged as the offense occurred on the twentieth day of April.

The COURT: So there was no opportunity to interpose a challenge?

Mr. STRONG: That is the point. I presume it will be conceded on the part of the State that the date alleged in the indictment is the twentieth of April. Is that true?

The PROSECUTOR: Of course.

Mr. STRONG: That is the date?

The PROSECUTOR: Yes.

The COURT: I think that this ought to be presented in a more formal way, Mr. Strong. Ought not it to be presented by a plea in abatement?

15 Mr. STRONG: I have prepared myself to present it in both ways, thinking there might be doubt which was the better. The preliminary motion, of course, is the motion to quash. If your Honor thinks then that it should be presented by that other method, I have prepared a plea in abatement, which I shall then file, so as to cover both methods of presenting the objection.

The COURT: I will allow you to make proof of this fact.

Q. What is your age, Mr. Warne?
A. I am seventy-two.
Q. Seventy-two?
A. Yes, past seventy-two.
Q. Past seventy-two?
A. Yes, sir.
Q. Did you serve as a member of the Grand Jury in finding the indictment against Lang?
A. I was there.
Q. Present at the hearing of the witnesses?
A. Yes, sir.
Q. And voted for it?
A. Yes, sir.

No cross examination.

ISAAC S. BENNETT, affirmed.

By Mr. STRONG:

Q. Are you a member of the Grand Jury at the present term?
A. Yes, sir.
Q. You have served on the Grand Jury?
A. Yes, sir.
Q. As a member of it?
A. Yes, sir.

16 Q. What is your age?
A. Sixty-five years of age.
Q. Any more than that?
A. Since May.

By the PROSECUTOR:

Q. Sixty-five in May?
A. Yes, sir.

By Mr. STRONG:

Q. Do you mean that May was your sixty-fifth birthday?
A. Yes, sir.
Q. Were you born in the year 1839?
A. I think I was. That is sixty-seven.
Q. Sixty-seven?
A. Yes, sir.
Q. You took part in the hearing of an investigation of the charge in the indictment against Lang, did you?
A. I did.

No cross examination.

Mr. STRONG: I desire to offer the minutes showing the empanelling of the Grand Jury on, I believe it is the third of April, at any rate, the first Tuesday in April of the present year, and I desire to have on the record the admission on the part of the State that the act charged against the defendant occurred on the twentieth of April.

The COURT: The indictment alleges it occurred on the twentieth. I take that, of course.

Mr. STRONG: I presume the date would not be binding, but I will make proof that that is the true date. I understand it to be admitted on the part of the State.

The PROSECUTOR: Yes.

Mr. STRONG: That is the completion of our proof.

17 Minutes of Middlesex Oyer and Terminer.

Page 385, &c.

April Term, 1906.

At a session of the Court of Oyer and Terminer and General Jail Delivery, holden at New Brunswick, in and for said County of Middlesex, on the first Tuesday in April, 1906.

Hon. J. Franklin Fort, Justice of the Supreme Court of Judicature, and Hon. Theodore B. Booraem, Judge of the Court of Common Pleas of the County of Middlesex, constituting a Court of Oyer and Terminer and General Jail Delivery in and for said County.

The following return was made by the Sheriff of said County.

"To the Judges of the Court of Oyer and Terminer and General Jail Delivery, holden at New Brunswick, in and for the said County of Middlesex, the first Tuesday of April, 1906:

I, Andrew S. Church, Sheriff of the said County, do hereby certify and that I have duly summoned the following named twenty-four good lawful men of the body of said County, qualified by law to

serve to make a Grand Jury in the Court aforesaid, according to the form of the statute in such case made and provided:

1. James M. Parsons, North Brunswick.
2. James E. Berry, Woodbridge.
3. Joseph Mark, South River.
4. Henry E. Ayres, Metuchen.
5. Hezekiah Warne, Madison.
6. Frederick M. Townley, Sayreville.
7. Isaac S. Bennett, South Brunswick.
8. Charles M. Davison, Jamesburg.
9. Alphonso S. Mundy, New Brunswick.
10. Edward E. Haines, South Amboy.
11. Edward Jaques, South Amboy.
12. Charles W. Hoagland, Monroe.
13. Walter A. Belcher, Perth Amboy.
18 14. Charles Edwards, Perth Amboy.
15. Charles Fletcher, Perth Amboy.
16. Adrain G. Chamberlain, New Brunswick.
17. Edward Van Pelt, New Brunswick.
18. Peter J. Young, New Brunswick.
19. John V. Hubbard, New Brunswick.
20. Thomas L. Slugg, Carteret.
21. Lemuel Stults, Cranbury.
22. Charles E. Kelley, Piscataway.
23. William H. Jameson, South Brunswick.
24. Heyman Shragowitz, Perth Amboy.

Summoned by me,

ANDREW S. CHURCH, *Sheriff.*

The names of the Grand Jurors so summoned being called, answered to their names except W. E. Jameson, who was excused by the Court. The following named persons were duly sworn:

1. James M. Parsons.
2. James E. Berry.
3. Joseph Mark.
4. Henry E. Ayres.
5. Hezekiah Warne.
6. Frederick M. Townley.
7. Isaac S. Bennett, affirmed.
8. Charles M. Davison.
9. Alphonso L. Mundy.
10. Edward E. Haines.
11. Edward Jaques.
12. Charles W. Hoagland.
13. Walter A. Belcher.
14. Charles Edwards.
15. Charles Fletcher.
16. Adrain G. Chamberlain.
17. Edward Van Pelt.
18. Peter J. Young.
19. John V. Hubbard.

20. Thomas L. Slugg.
21. Samuel Stults.
19–160 22. Charles E. Kelley.
23. Heyman Schragowitz.

Constables Jacob Gordon and Richard Peltier were appointed to attend to the Grand Jury during their sessions.

The COURT: I overrule the motion to quash.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

F. J. SWAYZE, *J.* [L. S.]

Mr. STRONG: I desire to present a plea in abatement, setting up the same matter. (Reads plea in abatement.)

The PROSECUTOR: The State demurs to that plea.

The COURT: I sustain the demurrer to that plea.

Mr. STRONG: I was going to say perhaps there should accompany the plea an affidavit, which I have not prepared, but I can prepare it very shortly if your Honor will allow me to supply it.

The COURT: I will allow you to supply the affidavit required by statute verifying the facts stated in the plea.

Mr. STRONG: I thought possibly in view of the proof made in the presence of the Court it might not be required, but it is better to have it.

(Affidavit verifying the plea was thereupon made and filed with said plea.)

The COURT: If there is nothing further, the defendant may plead again to the indictment.

Mr. STRONG: I pray an exception to the sustaining of the demurrer.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed according.)

F. J. SWAYZE, *J.* [L. S.]

* * * * * * *

161 New Jersey Supreme Court.

THE STATE OF NEW JERSEY, Defendant in Error,
v.
FREDERICK LANG, Plaintiff in Error.

On Error to Middlesex Oyer.

Assignment of Errors.

[Filed December 6, 1906.]

And now on this sixth day of November, in the year nineteen hundred and six, before the Supreme Court of Judicature of the State of New Jersey, at Trenton, comes the said Frederick Lang, plaintiff in error, by Alan H. and Theodore Strong, his attorneys, and says

that in the record and proceedings and also in the giving of judgment upon the said indictment against him in the Court of Oyer and Terminer of Middlesex County, and in the bills of exception taken upon the said trial, there is manifest error in this:

1. That the said Court overruled and refused the motion on behalf of the said defendant to quash the said indictment (*pro ut* the bills of exception).

2. And in this, that the said Court sustained the demurrer of the State of New Jersey to the plea in abatement filed by the said defendant to the said indictment.

3. And in this, that the said defendant, notwithstanding his objections in that behalf made by motion to quash the said indictment and by his plea in abatement thereof, was forced and compelled by the said Court to answer unto the said indictment and to be tried, convicted and sentenced thereupon, notwithstanding that two of the members of the grand jury by which the said indictment was found and who took part in the finding thereof by said grand jury, to wit:

162–164 Hezekiah Warne and Isaac S. Bennett, were at the time of being empanelled and sworn upon the said grand jury, over the age of sixty-five years; and notwithstanding that the matter on account of which the said indictment was found occurred subsequent to the empanelling of the said grand jury and to the swearing of the two persons as members thereof; and notwithstanding that no matter had occurred or was charged to have been done o- committed by the said defendant, for which he was liable to be indicted, prior to the empanelling of the said grand jury or to the swearing of the said two persons as members thereof; and notwithstanding that the said defendant had no opportunity to object to the said two persons on account of their being as aforesaid over the age of sixty-five years, prior to their being sworn as members of the said grand jury. And the said plaintiff in error says that by the said action of the said Court in the premises he has been deprived of his liberty and has been sentenced and adjudged to be deprived of his life without due process of law, and has therein and thereby been denied the equal protection of the laws, all contrary to and in violation of the first section of the fourteenth amendment to the Constitution of the United States, upon which the said plaintiff in error relies in that behalf.

* * * * * * *

165 Wherefore, because of the said errors and of other errors appearing in the said record and proceedings, the said plaintiff in error prays that the judgment of the said Court of Oyer and Terminer of the County of Middlesex may be reversed, annulled and for nothing holden, and that he may be restored to all things that he hath lost on occasion of said judgment.

ALAN H. & THEO. STRONG,
Attorneys for Plaintiff in Error.

GEORGE BERDINE,
Prosecutor.

Service acknowledged December 6, 1906.

[Joinder in error in common form, filed January 8, 1907.]

166 New Jersey Supreme Court.

THE STATE OF NEW JERSEY, Defendant in Error,
v.
FREDERICK LANG, Plaintiff in Error.

On Error to Middlesex Oyer and Terminer.

Causes for Reversal.

[Filed February —, 1907.]

The said Plaintiff in Error having caused the entire record of the proceedings at the trial to be certified and returned with his Writ of Error, hereby specifies the following causes upon which he relies for a reversal of said judgment, that is to say:

1. Because, notwithstanding his objections in that behalf made by motion to quash the said indictment and by his plea in abatement thereof, he was forced and compelled by said Court of Oyer and Terminer to answer unto the said indictment and was tried, convicted and sentenced thereon, although two members of the grand jury by which the said indictment was found and who took part in the finding thereof by said grand jury, to wit: Hezekiah Warne and Isaac Scudder Bennett, were at the time of being empanelled and sworn upon said grand jury over the age of sixty-five years; and notwithstanding that the matter on account of which the said indictment was found occurred subsequent to the empanelling of the said grand jury and to the swearing of the said two persons as members thereof; and notwithstanding that said defendant had no opportunity to object to the said two persons on account of their being as aforesaid over the age of sixty-five years, prior to their being sworn as members of the said grand jury. And the said
167 plaintiff in error says that by the said action of the said Court in the premises he has been deprived of his liberty and has been adjudged to be deprived of his life, without due process of law, and has therein and thereby been denied the equal protection of the laws, all contrary to and in violation of the first section of the fourteenth amendment to the Constitution of the United States upon which the said plaintiff in error relies in that behalf.

* * * * * * *

168 & 169 ALAN H. & THEO. STRONG,
Attorneys for Plaintiff in Error.

Service acknowledged February 2, 1907.
GEORGE BERDINE,
Prosecutor.

170 N. J. Court of Errors & Appeals.

STATE OF NEW JERSEY, Defendant in Error,
vs.
FREDERICK LANG, Plaintiff in Error.

Argued July 5, 1907. Decided Nov. 18, 1907.

1. The 6th section of "An act concerning juries," (Revision), approved March 27, 1874, prescribes as qualifications of grand jurors that they shall be citizens of this State and residents of the county from which they are taken and shall be above the age of twenty-one and under the age of sixty-five years, and that if any person who is not so qualified shall be summoned, as a grand juror it shall be good cause of challenge to any such juror, who shall be discharged upon such challenge being verified according to law or on his own oath or affirmation, provided that no exception to any such juror on account of his citizenship, age or any other legal disability shall be allowed after he has been sworn or affirmed.

Held, that the object of these statutory provisions is to secure an effective and representative body of citizens to take part in the due administration of the law for the benefit of all who are entitled to its protection, and not specially or even primarily for the benefit of those charged with its violation; and that the classification on which the statute rests is co-extensive with the scope of its protection being nothing less than the entire community, law-abiding as well as law-breaking.

Held also, that in view of this scope of the statute its provision that no exception to a grand juror on account of his age shall be allowed after he has been sworn does not within the meaning
171 of the first section of the 14th amendment to the Federal Constitution deny the equal protection of the laws to one indicted for a crime committed after such grand juror had been sworn.

On Error to Supreme Court.

For the Plaintiff in Error, Alan H. Strong.
For the State, George Berdine, Prosecutor, and Aaron V. Dawes.

The opinion of the Court was delivered by GARRISON, *J.:*

This writ of error is directed to the Supreme Court and brings up with the judgment of that Court an indictment for murder and a conviction thereunder in the Middlesex Oyer which was upon error affirmed by the Supreme Court. The grand jury that found the indictment was organized on the third day of April, 1906, at which time two grand jurors who were above the age of sixty-five years were sworn without challenge. On the twentieth day of the same month the plaintiff shot and killed his niece, for which he was indicted by the grand jury which was then sitting. This circumstance, namely, that the two grand jurors who were above the age of

sixty-five had been sworn before the offense for which the plaintiff in error was indicted had been committed, gives rise to the main contention upon which counsel relies for the reversal of the judgment contained in this record, the broad contention of counsel in this respect is that section 6 of the revised act concerning juries which provides that a grand juror who is above the age of sixty-five years shall be discharged if challenged before he is sworn denies to the plaintiff in error the equal protection of the laws, in violation of the 1st section of the fourteenth amendment of the Constitution of the United States.

This contention is thus concisely stated in the supplemental brief of counsel for the plaintiff in error: "Since the object of the
172 statute directing the discharge upon the objection of the defendant of persons returned as jurors but not possessing the necessary qualifications was the benefit or protection of the defendant, the right of objection to such unqualified persons must be extended to all who are within the reason of the provision."

The syllogistic argument upon this point is as follows: The right to challenge any grand juror upon any of the statutory grounds contained in section 6 of the jury act is a legislative measure for the benefit or protection of persons charged with crime before such grand jury. The plaintiff in error is such a person. But by force of the decision in *State vs. Hoffman* (42 Vr., p. 285) this right of challenge cannot be exercised after the grand jury has been sworn. When this grand jury was sworn the plaintiff in error had not yet committed the offense for which he was indicted and hence had no opportunity to exercise the right given by the statute. The benefit of the statute therefore does not extend to all who stand in a similar relation to its purpose, that is, all who equally require its protection, hence the plaintiff in error (such is the conclusion) is denied the equal protection of the laws guaranteed to him by the fourteenth amendment of the Federal Constitution.

This conclusion it will be observed rests fundamentally upon the proposition that the right to have a grand juror discharged upon the statutory grounds stated in section 6 of the jury act is for the benefit or protection of a particular class of persons whom, to avoid constant paraphrase, we shall call putative criminals. This class includes those who have actually committed crime before the grand jury was sworn or who at that period were charged with or suspected of crime, or who being wholly innocent thereof were ignorant of the fact that they were so suspected, as well as those charged with having
173 committed a crime during the sitting of the grand jury, that is, after the administration of the oath to its members. Inasmuch as the entire class thus constituted stands in a similar relation to what counsel conceives to be the purpose of the statute and in equal need of its benefit and protection his contention is that the circumstance that the crime for which a given person was indicted was committed after rather than before a given grand juror was sworn is insignificant upon the question of the substantial character of the classification apparently adopted by the Legislature which

unless it be substantial places the statute under the ban of the fourteenth amendment of the Federal Constitution.

The question as argued by counsel turns therefore upon the substantial character of the classification of putative criminals into those charged with a crime committed before a grand jury was sworn and those charged with having committed a crime during its sitting.

The supreme Court adopting, provisionally at least, the construction placed upon this statute by counsel reached the conclusion that the section in question did not violate the Federal Constitution because the classification on which it was based was substantial in that it treated alike all persons who were charged with crime under like circumstances and conditions, and that the circumstance that crime was committed at a time when the right of challenge could be exercised rather than after it had expired afforded a substantial basis for classification upon which the denial of such right to persons who fell within the latter class might constitutionally be rested. State *v.* Lang 66 Atl. Rep. 942.

174 Whether, if we were to admit the soundness of the construction placed upon the statute by counsel, we should come to the conclusion that he has reached or to that reached by the court below is a matter that need not now detain us, for the reason that in either event such conclusion would in our judgment rest upon an essentially mistaken conception of the purpose and scope of the 6th section of the jury act. In fine we do not concede that the object of that enactment was the protection of criminals either actual or putative. Indeed we see no valid reason for supposing that the statutory grounds of disqualification of grand jurors set forth in the section under consideration were instituted by the Legislature for the benefit of any special class of persons or that the scope of its protection was anything less than the entire community, the law abiding as well as the law breaking. On the contrary, in order to state at once the conclusion to which we have come, we think that the purpose of the statute in question was the furtherance of the due and efficient administration of justice for the protection of those against whom crimes might be committed as well as those who might be charged with the commission of such crimes; and that when the Legislature declared that lack of State citizenship or county residence, that non-age or advancing years should constitute disabilities in a grand juror the object sought to be attained was to secure an efficient and representative body of citizens to take part in the due administration of the law for the benefit of all who were entitled to its protection, and not specially or even primarily for the benefit of those who were charged with its violation. If this be the scope of the statute, the question of the substantial classification of putative criminals upon which the argument of counsel depends drops wholly out of the case and the matter upon which the court below and counsel for the plaintiff in error are at variance cease to be of any practical importance.

175 Our reasons for thinking that the statute has this broader scope are many and various. In the first place the grounds of the declared disability of grand jurors are all directed at the make-up of that body with respect to its working efficiency and represent-

ative character and are by this feature as widely as possible distinguished from those common law grounds of challenge for prejudice, malice, ill will and the like, which being directed solely against a given person conferred upon him a personal right of challenge. No reason has been given and none can be suggested why a grand juror who was under twenty-one or over sixty-five or who was not a citizen of the State or a resident of the county should on any of these accounts be either more or less likely to favor the indictment of a given person against whom a criminal charge might be preferred; whereas upon the other hand there is every reason why a representative body of men who are to form part of the judicial machinery of a locality should be composed of persons sufficiently identified with the State and county to be citizens of the one and residents of the other; and why a public body of whom responsible and discriminating duties are required should be of an age when judgment is presumably mature and when the physical and intellectual powers have not begun to decline. In this connection the provision of the statute that a challenge for any of the recited disabilities shall if sustained lead to the absolute discharge of the grand juror points strongly in the same direction and serves further to distinguish the purpose of these statutory challenges from those permitted at common law which resulted not in the absolute discharge of the challenged juror from the public service but merely in preventing him from sitting upon the individual case of the challenger. Unless the purpose of the statute was to purge the grand jury for the general good, it is impossible to assign a single reason why a challenge by an individual threatened with
176 indictment should if sustained go any further than is required for his individual protection. The further provision of the statute to the effect that grand jurors although not possessed of the statutory qualifications may serve upon that body unless challenged before they are sworn points also in the same direction and militates strongly against the idea that its provisions were deemed essential to the protection of a particular class of persons. The public character of the statute which we thus find clearly indicated by its terms and inherent in its provisions is consistent with a rational and entirely practical scheme for securing the representative character and working efficiency of an important arm of the public service both in its directory effect upon the officer who selects the grand jury and by the supervision reposed in the public and the Court, and as such is free from any element of incongruity or impracticality; while the opposite view which regards the statute as designed solely for the benefit or protection of those against whom indictments may be found is so inept to this end and leads to results that are so incongruous, not to say absurd, as to require its rejection if there is any other permissible construction to which such absurdities do not attach. That these elements of ineptitude inevitably result from this latter construction of the statute must be at once apparent to any one who is at all familiar with the actual procedure by which the grand jury is organized. The Sheriff selects the grand jurors and privately notifies each to be present on the first day of the ensuing term. On that day immediately after the opening of

the courts the Clerk calls the list of grand jurors that has been privately furnished to him by the Sheriff and as each grand juror's name is called he comes forward, and when twenty-three or
177 less have thus responded the oath is administered to the grand jury. This entire procedure from the calling of the first grand juror to the conclusion of the oath occupies but a few moments, while from the calling of the last grand juror to the administration of the oath to the foreman a few seconds only would probably intervene. To assume as we must do if the contention we are considering is correct that a right of challenge to be exercised under these conditions and in this brief space of time, without any opportunity being afforded for ascertaining in advance the personnel of the grand jury or any means provided for determining the existence of statutory disqualifications, is a substantial provision for the protection of a privileged class is to assume what is manifestly not so.

If such had been the legislative purpose it is only fair to presume that some sort of provision for the practical accomplishment of such purpose would have been provided.

I am not of course suggesting that persons who are apprehensive of being indicted may not be present if they choose at the opening of court and challenge any grand juror upon any of the grounds set forth in this statute, but I am insisting that while such right exists it is not confined by the statute to the particular class to which such persons belong or intended for their sole benefit and protection. The motive that actuates the challenge of a putative criminal may be different from that of the ordinary person, but his right is no greater. If the object of the statute be to obtain a public body possessing certain qualifications, the motive that directs the attention of the Court to the fact that one or more of the persons summoned for service upon such body do not possess the requisite qualifications is quite immaterial provided the legislative object be thereby forwarded.

To this end the Legislature may well lay hold of the most
178 diverse motives. In this connection it is most significant that the challenger of a grand juror may be *amicus curiæ* and this had been the rule of the English courts from an early period. In *Second Viner's Abridgement* (*Tit. Amicus Curiæ*) it is said: "Upon an outlawry the question was whether one as *amicus curiæ* might appear and quash an inquisition found upon the outlawry for matter insufficient apparent. Nicholas and Parker, Barons, take it clearly upon the book of 7 E. 4. that an *amicus curiæ* might show cause to quash the inquisition and said that Bonnett's case which had been urged to the contrary went off by the agreement of the parties."

Other instances of the exercise of this right by *amicus curiæ* are given by Mr. Justice Bradley in U. S. *vs.* Gale (109 U. S., p. 68). Mr. Bishop says, "Doubtless it is competent for the Court to permit an *amicus curiæ* to suggest an imperfection in the empanelling of the grand jury." (1 Crim. Pro., Sec. 877.) In our own State the question came before Mr. Justice (now Chancellor) Magie, in the Somerset Oyer in a case reported in 3 N. J. L. J., p. 153, *sub nom.*, "Challenge to grand jury," where Mr. Justice Magie is reported to have said, "In the case of the presents body which was empanelled

at the first of this term as a grand jury two objections are made. One comes from the Prosecutor of the Pleas who represents the State. In the exercise of his duties representing the State he asks the Court to examine alleged irregularities beause as he says and with great propriety the Court ought not to proceed to try indictments found by the grand jury in respect to whose constitution and empanelling there is a legal question. The other objection comes from a counsellor who as *amicus curiæ* or as counsel for accused persons now in jail awaiting the action of this grand jury also interposes objections. An objection may be made by counsel either as *amicus curiæ* or as representing accused persons actually awaiting the action of the grand jury."

179 Counsel for the plaintiff in error in his brief admits the existence of this practice and cites several cases that support it, including the title *"Friend of Court"* in 9th *Encyclopedia of Pleading and Practice, page* 73. The force of this practice is met in counsel's brief by the suggestion that as such *amicus curiæ* has no remedy by writ of error the fact that the defendant before the commission of his crime might have acted as *amicus curiæ* does not give him *qua* defendant the equal benefit of the laws, a suggestion which begs the question and manifestly has no relation to the significant feature of the practice.

Not only does the provision in question fail to afford any practical protection to the class for whose special benefit it is said to have — enacted, but it does not even in theory undertake to afford any measure of protection to the only meritorious members of such class, namely those who, being innocent of crime, are ignorant of the fact that they are even suspected, for the hypothesis under review goes no further than to assume that the statute is of practical benefit to those who are either conscious of guilt or are under apprehension of indictment. This however leaves out of consideration all persons who being absolutely innocent have no reason to apprehend indictment. Admittedly these persons would derive no benefit at all from the momentary opportunity to challenge afforded by this statute; so that we have as a culminating absurdity that the Legislature has extended a special privilege to such members only of the putative criminal class as are either guilty of crime or are conscious of being likely to be indicted therefor, but has provided none at all for those who, being innocent, are not conscious of the need of such protection. Indeed nothing could be more fantastical than the picture of a concourse of persons apprehensive of

180 indictment gathered at the opening of court to see that the grand jury was composed of resident citizens of the proper age. The irony of such an imaginary concourse is that of those actually under accusation the most part would be in jail; that of those conscious of guilt but not yet incarcerated the most part would have fled the jurisdiction while of those who were conscious neither of guilt nor of accusation the most part would be elsewhere attending to their ordinary affairs.

To impute to the Legislature this train of impracticable absurdities when its enactment is capable of another construction

that is at once reasonable, practicable and consistent, is contrary to the canons by which this branch of the judicial function is regulated and controlled.

As against all these considerations there is but a single opposing line of argument, namely, that from the circumstance that the revision of 1874 placed the right of challenge as to grand jurors in the same section with a similar right as to petit jurors; the former must be deemed to be for the same purpose and to possess the same attributes as the latter. This counsel in his supplemental brief argues: "The duties of a juror often severely tax the physical as well as the mental powers and endurance. This is more conspicuously shown in the service upon a petit jury where a jury not infrequently is required to be kept together over night or longer under constant strain of discussion and even of heated argument in the efforts of the members to convince each other and to reach a verdict. In a capital case (often protracted for many days) the jurors are required to be kept together from the time they are empannelled until the verdict is rendered. Thus the very life of a defendant may depend upon the physical endurance as well as the mental vigor of those members of the jury who are favorable to him but who
181 might be obliged to yield their opinion and consent to a verdict against him from inability to hold out longer through the infirmities or impairment of vigor due to advancing years."

It is however familiar law that in construing a revision of statutes made by the consolidation of previous acts of the Legislature the same meaning should be given to such constituent statutes in their new setting that was accorded to them when enacted, unless a different legislative intent is plainly apparent.

Clement vs. Kaighn, 2 McC., p. 47.
State vs. Anderson, 11 Vr., p. 224.
Smith vs. Regan, 25 Vr., p. 167.
In Re Murphy, 3 Zab., p. 180.
Fries vs. Hendrickson, 16 Vr., p. 555.
O'Hara vs. Biscuit Company, 40 Vr., p. 202.
State vs. Hoffman, 42 Vr., p. 285.

Where such consolidation results in a legislative fiat that differs materially from the mandate of the original statutes, the purpose of the legislature to substitute such later expression of its will for the earlier one is plainly apparent. Thus the statute now under consideration was held by this Court in the case of *State vs. Hoffman* to extend to grand jurors the requirement respecting the period within which challenges must be made, although by the original act concerning juries such requirement was limited to the case of petit jurors. When however we pass from the affirmative provisions of a consolidation or revision of statutes to the consideration of the purpose and object of any constituent enactment we must almost of necessity consider such statute as an independent expression of the legislative will in the light of its original enactment regardless of its subsequent collocation. There is therefore no controlling
182 force in the suggestion that because the provisions for challenging grand jurors are now coupled with those for chal-

lenging petit jurors the object sought to be attained in each case was or is the same; while as a practical matter a moment's reflection will disclose to any one who is at all acquainted with the widely variant functions of these two bodies that not one of the conditions rehearsed in the foregoing citation from the brief of counsel has any real application to the case of the grand jury. Neither must it be lightly assumed that the word "challenge" as it is employed in the statute with respect to the absolute discharge of a grand juror has the special meaning in which it is used in the same statute with respect to the petit juror. Primarily the meaning of challenge is to call one out to answer for something. This in duelling "to call a man out" is synonymous with "to challenge" him. Other familiar examples of the use of the word are the challenge of a voter, a challenge by a sentry or even the challenge of the accuracy of a statement. The matter common to these uses of the word is that of formally directing the attention of some one to a matter that requires his action or decision. In this sense the word is aptly descriptive of the procedure by which the attention of the Court is called to the fact that on account of old age or the like a grand juror should be discharged from the public service. On the other hand the use of the word that has grown up in law with respect to the petit jury is both technical and special, namely, "the demand of a party that a certain person shall not sit in trial upon him or his cause." This special meaning may apply in a measure to the case of a grand juror who is challenged upon common law grounds, but as has already been pointed out the challenge of grand jurors upon statutory grounds if sustained results not as at common law in his refraining from sitting upon the case of the challenger but in his absolute discharge from the pub-
183 lic service. Too much stress therefore must not be laid upon the mere employment of this word without regard to whether its context calls for its general meaning or for its special and technical sense.

The argument of counsel which we have thus rehearsed in no way militates in our judgment against the conclusion that the 6th section of the jury act was intended for the general promotion of efficiency in an arm of the Court and not specially for the benefit or protection of any particular class. The argument that has been erected upon this latter proposition and upon the supposed necessity of a classification sufficiently broad to include the plaintiff in error is therefore without legal significance and falls to the ground.

We reach thus, although upon different grounds, the result reached by the Supreme Court. With the views that obtained in that Court we have for reasons already stated no present concern, excepting to say that no opinion concerning them need at this time be expressed.

Finally it should be noted that in all that has been said we have been dealing with the statutory disabilities of grand jurors alone and upon grounds that are applicable to challenges for such causes only. Whether the words of the statute "any other legal disability" include the common law grounds of prejudice, malice and the like and if so what would be the rights and remedies of an indicted person who

had had no opportunity to challenge a given grand juror upon these personal grounds is not involved in the facts of the present case or in the line of reasoning upon which in our judgment its decision should be placed.

The other grounds assigned for error are fully discussed in
184 the opinion delivered in the Supreme Court by Gummere, C. J., in whose conclusions upon these points we entirely concur.

In all respects therefore the judgment of the Supreme Court is affirmed.

"Endorsed: Filed Nov. 18, 1907. S. D. Dickinson, Clerk."

[Endorsed:] State of New Jersey, Department of State, Comparing and Certifying Division. Copy correct. Compared by Weatherby. Original read by Eppele. Hendricks, in charge of Division.

185 New Jersey Court of Errors and Appeals, June Term, 1907.

Between—

STATE OF NEW JERSEY, Defendant in Error,
vs.
FREDERICK LANG, Plaintiff in Error.

In Error to Supreme Court.

Order on Affirmance of Judgment.

This cause having been duly argued at the June Term, 1907, of this court by Alan H. Strong of counsel for the plaintiff in error, and George Berdine of counsel for the defendant in error, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this Eighteenth day of November in the year of our Lord one thousand nine hundred and Seven ordered and adjudged that the judgment of the Supreme Court, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment of the practice of said court.

On motion of

GEORGE BERDINE,
Prosecutor and Attorney of Defendant in Error.

Endorsed: "Filed Nov. 19, 1907, S. D. Dickinson, clerk."

[Endorsed:] "Filed November 19, 1907, S. D. Dickinson, clerk."

186 New Jersey Court of Errors and Appeals.

FREDERICK LANG, Plaintiff in Error,
vs.
THE STATE OF NEW JERSEY, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Supreme Court of the United States:

The petitioner Frederick Lang respectfully shows that your petitioner is at present confined in the county jail of the county of Middlesex in the State of New Jersey under and pursuant to a final judgment of the court of Oyer and Terminer of said County rendered on the — day of July in the year one thousand nine hundred and six, upon a certain indictment found in said court, whereby it was charged that your petitioner on the twentieth day of April in the year of our Lord one thousand nine hundred and six with force and arms at the township of Raritan in said county, did wilfully, feloniously and of his malice aforethought kill and murder one Katie Gordon against the form of the statute in such case made and provided; by which judgment it is considered that your petitioner be taken to the jail of the said county of Middlesex from whence he came and that he be there kept in strict custody until Tuesday the twenty-eighth day of August next ensuing, upon which day he should be hanged by the neck until dead.

And your petitioner shows that by a statute of the State of New Jersey entitled "An Act concerning juries," Revision approved March 27, 1874, as amended Pamphlet Laws 1876 page 360, it is provided as follows: (Section 6):

"That every person summoned as a grand juror in any court of this state, and every petit juror returned for the trial of any
187 action or suit of a civil or criminal nature, shall be a citizen of this state and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty five years; and if any person who is not so qualified, shall be summoned as a grand juror, or as a juror on the trial of any such action in any of the courts of this state, or if any person shall be summoned as a petit juror at any stated term of any court of this state, who has served as such at any of the three stated terms next preceding that to which he may be summoned, it shall be good cause of challenge to any such juror, who shall be discharged upon such challenge being verified according to law or on his own oath or affirmation in support thereof; provided, that no exception to any such juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he has been sworn or affirmed."

And your petitioner shows that the grand jury by which the said indictment was found was empanelled and the members thereof sworn upon said grand jury on the first Tuesday of April in the year nineteen hundred and six, and that two of the persons sworn and empanelled as members of the said grand jury upon said day

were at that time above the age of sixty five years; and that upon the said indictment being moved for trial, the plea of the general issue was by leave of said court withdrawn, and thereupon your petitioner moved to quash said indictment upon the ground that two members of said grand jury were at the time of being so sworn and empanelled as aforesaid above the age of sixty five years and therefore disqualified; and in support of said motion the counsel for your petitioner proved by the oaths of the said two grand jurors respectively that they were one of the age of seventy two and the other of the age of sixty seven years, and that they had both taken part in the hearing of the charge against your petitioner and
188 voted for said indictment, and also proved by the minutes of said court that said grand jury and said two members thereof had been sworn and empanelled on the first Tuesday, that is to say, the third day of said month of April, nineteen hundred and six; and it was further admitted on the part of the State that the date alleged in said indictment (to wit, the twentieth day of April, A. D. 1906) was the true date of the said alleged offence.

And your petitioner by his said counsel then and there insisted that the said indictment should be quashed, because the said two grand jurors at the time of being so sworn and empanelled, were above the lawful age, and thereby were disqualified for such service, and your petitioner had no opportunity to challenge or object to said grand jurors by reason of the fact that the said supposed crime wherewith your petitioner was so charged, had not been committed, (nor was there any charge of the commission of any crime by him), until after the swearing and empanelling of said grand jurors as aforesaid.

And your petitioner shows that the said court nevertheless denied the said motion to quash, to which ruling and decision of said court your petitioner by his counsel duly prayed an exception and the same was then and there allowed and sealed accordingly.

And your petitioner further shows that after the denial of said motion to quash your petitioner filed a plea in abatement of the said indictment in due form and duly verified by affidavit, setting forth the same matters aforesaid; to which said plea the State of New Jersey filed a demurrer, and the said court sustained the demurrer and held the same to be good and that the said plea in abatement should not be allowed; to which ruling and decision of said court your petitioner by his said counsel duly prayed an exception, and the same was then and there allowed and sealed accordingly.

189 And your petitioner shows that after the said demurrer to said plea in abatement had been sustained as aforesaid, your petitioner being called upon to plead over to the said indictment declined so to do and thereupon the said court ordered that a plea of not guilty be entered for your petitioner upon which plea he was accordingly tried and convicted of murder in the first degree and judgment was pronounced against him as aforesaid.

And your petitioner shows that after the entry of said judgment your petitioner duly sued out of the Supreme Court of the State of

New Jersey a writ of error duly allowed by the Honorable William J. Magie, Chancellor of said State, directed to said the Court of Oyer and Terminer of Middlesex County to review the said conviction and judgment so as aforesaid pronounced against your petitioner, and that your petitioner among other things assigned for error and as cause for reversing the said judgment of the said Court of Oyer and Terminer, the refusing of the said Court of the motion on behalf of your petition- to quash the said indictment as hereinbefore set forth; and that your said petitioner further and separately assigned for error and as cause for reversing the said judgment that the said Court of Oyer and Terminer sustained the demurrer of the State of New Jersey to the plea in abatement filed by your petitioner to the said indictment as is also above set forth.

And that your petitioner also further and separately assigned for error and as cause for reversing the said judgment, as follows: "that the said defendant, notwithstanding his objections in that behalf made by motion to quash the said indictment and by his plea in abatement thereof, was forced and compelled by the said Court to answer unto the said indictment and to be tried, convicted and sentenced thereupon, notwithstanding that two of the members of the grand jury by which the said indictment was found and who
190 took part in the finding thereof by said grand jury, to wit: Hezekiah Warne and Isaac S. Bennett, were at the time of being empanelled and sworn upon the said grand jury, over the age of sixty-five years; and notwithstanding that the matter on account of which the said indictment was found occurred subsequent to the empanelling of the said grand jury and to the swearing of the two persons as members thereof; and notwithstanding that no matter had occurred or was charged to have been done or committed by the said defendant, for which he was liable to be indicted, prior to the empanelling of the said grand jury or to the swearing of the said two persons as members thereof; and notwithstanding that the said defendant had no opportunity to object to the said two persons on account of their being as aforesaid over the age of sixty-five years, prior to their being sworn as members of the said grand jury. And the said plaintiff in error says that by the said action of the said Court in the premises he has been deprived of his liberty and has been sentenced and adjudged to be deprived of his life without due process of law, and has therein and thereby been denied the equal protection of the laws, all contrary to and in violation of the first section of the fourteenth amendment to the Constitution of the United States, upon which the said plaintiff in error relies in that behalf."

And your petitioner further shows that the said cause upon the said writ of error and the said assignments of error having been duly argued before the said Supreme Court, the said Court did at the June Term thereof in the year nineteen hundred and seven, render its judgment that the judgment of the said Court of Oyer and Terminer of the County of Middlesex be affirmed, and that the record be remitted to said court to be proceeded with in accordance with the judgment and practice of said court.

191 And your petitioner further shows that your petitioner on or about the nineteenth day of June, nineteen hundred

and seven, duly sued out of the Court of Errors and Appeals in the last resort, in all causes of the State of New Jersey, a writ of error directed to the said Supreme Court of said State to review the said judgment of the said Supreme Court affirming the aforesaid judgment of the said Court of Oyer and Terminer of the County of Middlesex, and that the record of the proceedings at the trial of the said indictment and also the judgment of the said Court of Oyer and Terminer as well as the said judgment of the said Supreme Court affirming the same, having been duly returned and brought into the said Court of Errors and Appeals, your petitioner assigned as error and as cause for reversing the said judgment of the said Supreme Court, and also the said judgment of the said Court of Oyer and Terminer, among other things the following:

"That by the affirmance by said Supreme Court of the said judgment of the Court of Oyer and Terminer the said Frederick Lang, defendant, has been denied the equal protection of the laws, and has been adjudged to be deprived of his life and liberty without due process of law (contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States, upon which the said defendant relies in this behalf), in that the indictment upon which he was convicted of murder in the first degree in the said Court of Oyer and Terminer was found by a grand jury empaneled before the commission of the said alleged offence, two members of which said grand jury, namely Hezekiah Warne and Isaac S. Bennett, sworn and empanelled as aforesaid prior to the alleged commission of said offence, were at the time of being sworn and empanelled, above the age of sixty-five years, and therefore not qualified to serve as members of the said grand jury, and the said defendant by reason of the said grand jury and the said
192 members thereof having been sworn and empanelled before the alleged commission of said offence, had no opportunity to challenge said persons, and although the said defendant duly moved to quash the said indictment in the said Court of Oyer and Terminer upon the ground of said two members of said grand jury having been as aforesaid above the lawful age for such service and afterwards pleaded the said facts in abatement of the said indictment, said motion to quash and plea in abatement were respectively denied and overruled by the said Court of Oyer and Terminer, which action of the said Court of Oyer and Terminer was approved and held valid by the said Supreme Court by its affirmance of said judgment, notwithstanding the complaint thereof by the said Frederick Lang upon his said writ of error in said Supreme Court."

And your petitioner shows that the said cause upon the said last mentioned writ of error was duly argued before the said Court of Errors and Appeals of the State of New Jersey at the last June term thereof, and that the said Court having taken time to consider the same, did on the eighteenth day of November in the year nineteen hundred and seven, render its decision in a certain opinion filed on said last mentioned date by the Honorable Charles G. Garrison, one of the Judges of said court, by which decision and opinion the said court held and decided that the denial of the said motion to quash the said indictment and the sustaining of the said demurrer

to the said plea in abatement by said Court of Oyer and Terminer, as hereinbefore particularly set forth, were lawful and proper and were not contrary to the first section of the Fourteenth Amendment of the Constitution of the United States, and that thereby the equal protection of the laws had not been denied to your petitioner; and thereupon a vote having been taken by the said Court of Errors and Appeals in open court, it was ordered that the said judgment of the said Supreme Court be affirmed, and judgment of af-
193 firmance has been entered accordingly in the said Court of Errors and Appeals.

And your petitioner shows that in the said judgment of the said Court of Errors and Appeals there was expressly drawn in question the construction of the clause of the first section of the Fourteenth amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that the decision of the Court of Errors and Appeals was against the right so as aforesaid specially set up and claimed by your petitioner in and by his said assignments of error under the said clause of the said amendment.

And your petitioner further shows that there was manifest error in the record and proceedings in said cause and in the judgment aforesaid, whereby the said Court of Errors and Appeals of the State of New Jersey affirmed the said judgment of the said Supreme Court of said State as is shown by the copy of said record and the assignments of error herewith presented; wherefore your petitioner prays that a writ of error may be allowed and issued out of this court to the said Court of Errors and Appeals of the State of New Jersey to review the said judgment for the cause aforesaid.

And your petitioner will ever pray, etc.

ALAN H. STRONG,
Attorney for and of Counsel with
Frederick Lang, Plaintiff in Error.

The writ of error above prayed is hereby allowed to act as supersedeas upon filing bond in $500.—approved by me.

W. J. MAGIE, *C. of J.*

November 27, 1907.

[Endorsed:] N. Jersey Ct. of Errors & Appeals. Frederick Lang *v.* The State of New Jersey. Petition for Writ of Error, to Sup. Ct. of United States. Alan H. Strong, Att'y.

194 New Jersey Court of Errors and Appeals.

FREDERICK LANG, Plaintiff in Error,
vs.
THE STATE OF NEW JERSEY, Defendant in Error.

Assignments of Error.

The plaintiff in error, Frederick Lang, in connection with his petition filed herein praying for a writ of error to the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, to correct the errors made by said court in a certain cause wherein the said Frederick Lang was plaintiff in error and the State of New Jersey was defendant in error on a writ of error issued out of said Court of Errors and Appeals to the Supreme Court of said State of New Jersey, to review a judgment of the said Supreme Court affirming a judgment of the Court of Oyer and Terminer of the County of Middlesex, upon an indictment against the said Frederick Lang for murder upon which he was convicted and sentenced to death in the said Court of Oyer and Terminer of the County of Middlesex, says that in the said judgment and proceedings there is manifest error, to wit:

1.

That the said Court of Errors and Appeals of the State of New Jersey erred in affirming the said judgment of the Supreme Court of said State as above mentioned and thereby the said Frederick Lang, defendant and now plaintiff in error, will be deprived of his life without due process of law, and has been denied the equal protection of the laws, contrary to and in violation of the first section of the Fourteenth amendment to the Constitution of the United States.

2.

195 That the said Court of Errors and Appeals of the State of New Jersey erred in that it held and decided that the motion made on behalf of said defendant in the said Court of Oyer and Terminer to quash the said indictment because two members of the grand jury by which the same was found, were at the time of being sworn and empanelled as such grand jurors, above the age of sixty five years (and therefore by force of the statute of the State of New Jersey disqualified for such service) —; by which decision of said Court of Errors and Appeals and the judgment based thereon, affirming the judgment of the said Supreme Court, the said defendant now plaintiff in error, will be deprived of his life, without due process of law and has been denied the equal protection of the laws, contrary to and in violation of the first section of the Fourteenth amendment to the Constitution of the United States.

3.

That the said Court of Errors and Appeals of the State of New Jersey erred in that it held and decided that the demurrer of the State of New Jersey to the plea in abatement filed by the said defendant to the said indictment, was properly sustained and said plea disallowed by said court of Oyer and Terminer of Middlesex County, by which said decision and the judgment of said Court of Errors and Appeals based thereon the said defendant and now plaintiff in error will be deprived of his life without due process of law, and has been denied the equal protection of the laws, contrary to and in violation of the first section of the Fourteenth amendment to the Constitution of the United States.

4.

That the said Court of Errors and Appeals of the State of New Jersey erred in that it refused to sustain the second assignment of error filed in the said court of Errors and Appeals which is in the following language, to wit:

"That by the affirmance by said Supreme Court of the said judgment of the Court of Oyer and Terminer the said Frederick Lang,
defendant, has been denied the equal protection of the laws,
196 and has been adjudged to be deprived of his life and liberty
without due process of law (contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, upon which the said defendant relies in this behalf), in that the indictment upon which he was convicted of murder in the first degree in the said Court of Oyer and Terminer was found by a grand jury empaneled before the commission of the said alleged offence, two members of which said grand jury, namely, Hezekiah Warne and Isaac S. Bennett, sworn and empanelled as aforesaid prior to the alleged commission of said offence, were at the time of being so sworn and empaneled, above the age of sixty-five years, and therefore not qualified to serve as members of the said grand jury, and the said defendant by reason of the said grand jury and the said members thereof having been sworn and empanelled before the alleged commission of said offence, had no opportunity to challenge said persons, and although the said defendant duly moved to quash the indictment in the said Court of Oyer and Terminer upon the ground of said two members of said grand jury having been as aforesaid above the lawful age for such service and afterwards pleaded the said facts in abatement of the said indictment, said motion to quash and plea in abatement were respectively denied and overruled by the said Court of Oyer and Terminer, which action of the said Court of Oyer and Terminer was approved and held valid by the said Supreme Court by its affirmance of said judgment, notwithstanding the complaint thereof by the said Frederick Lang upon his said writ of error in said Supreme Court."

5.

That the said Court of Errors and Appeals of the State of New Jersey erred and said judgment is erroneous because therein and

thereby sundry other errors of law are manifest and contrary to the constitution of the United States and the law of the land. Wherefore the said Frederick Lang, plaintiff in error prays that the
197 said judgment and *remittitur* of the said Court of Errors and Appeals be vacated, set aside and for nothing holden, and that he may have such other and further relief as may be necessary and proper.

ALAN H. STRONG,
Attorney for and of Counsel with Frederick Lang, Plaintiff in Error.

[Endorsed:] N. Jersey Ct. of Errors & Appeals. Frederick Lang *v.* The State of New Jersey. Assignments of Error. Alan H. Strong, Att'y.

198 Know all men by these presents that we Alan H. Strong and Theodore Strong, of the City of New Brunswick, County of Middlesex and State of New Jersey, are held and firmly bound unto the State of New Jersey in the sum of Five Hundred Dollars, lawful money of the United States, to be paid to the said The State of New Jersey, its certain attorney or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-seventh day of November, in the year nineteen hundred and seven.

Whereas lately at a Court of Errors and Appeals of the State of New Jersey in a cause therein depending between Frederick Lang, plaintiff in error, and the said The State of New Jersey, defendant in error, judgment was rendered against the said plaintiff in error affirming the judgment of the Supreme Court of said State, and the said Frederick Lang, plaintiff in error, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court of Errors and Appeals to review the said judgment of the said Court of Errors and Appeals in the Supreme Court of the United States, and also a citation directed to the said the State of New Jersey citing and admonishing it to be and appear at a Supreme Court of the United States at Washington to answer to the said writ of error:

Now, the condition of this obligation is that if the said Frederick Lang shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void, otherwise to remain in full force and virtue.

ALAN H. STRONG. [L. S.]
THEODORE STRONG. [L. S.]

Signed, sealed and delivered in the presence of—
FREEMAN WOODBRIDGE.

199 STATE OF NEW JERSEY, *Middlesex County, ss:*

Alan H. Strong and Theodore Strong being severally by me duly sworn according to law, each on his own oath doth say that he is a resident of the City of New Brunswick, County of Middlesex and

State of New Jersey and is one of the persons who executed the above bond; that he is the owner of real estate in the said County of Middlesex and is worth more than the sum of five hundred dollars over and above all debts, liabilities and exemptions.

ALAN H. STRONG.
THEODORE STRONG.

Sworn and subscribed before me this twenty-seventh day of November, 1907.

FREEMAN WOODBRIDGE,
Master in Chancery of New Jersey.

[Endorsed:] Supreme Court of U. S. Frederick Lang, *v.* The State of New Jersey. On Error to N. J. Ct. of Errors & Appeals. *Bond.* Approved November 27, 1907. W. J. Magie, C. & P. J. Court of Errors.

200 STATE OF NEW JERSEY.

[VIGNETTE.]

DEPARTMENT OF STATE.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and *ex-officio* Clerk of the Court of Errors and Appeals in the last resort in all causes in said State of New Jersey, do hereby certify that the foregoing is a true transcript of the entire record and proceedings in the case of the State of New Jersey, defendant in error, against Frederick Lang, plaintiff in error, on writ of error to the Supreme Court of said State, as the same were before the said Court of Errors and Appeals, and now remain in my custody as such clerk, together also with a copy of the Bond filed with me as such Clerk, on the twenty-seventh day of November, A. D., nineteen hundred and seven.

And I further certify, that there is annexed hereto, the original citation and writ of error to the Supreme Court of the United States, which were lodged with me as such Clerk, on the twenty-seventh day of November, in the year of our Lord, nineteen hundred and seven, together with copies thereof for the State of New Jersey.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Trenton, this Twenty-third day of December, A. D., 1907.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON,
Secretary of State.

201 UNITED STATES OF AMERICA, *ss:*

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

The President of the United States to the Honorable the Judges of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, Greeting:

Because in the record and proceedings and also in the rendition of judgment of a plea which is in the said Court of Errors and Appeals in the last resort in all causes before you, (being the highest Court of law or equity of the said State, in which a decision could be had), in the suit between Frederick Lang, plaintiff in error and the State of New Jersey, defendant in error, upon a writ of error to review a judgment of the Supreme Court of the said State, affirming a judgment of the Court of Oyer and Terminer of the County of Middlesex upon an indictment found against the said Frederick Lang in said Court of Oyer and Terminer for murder, upon which indictment he was convicted and sentenced to death, in which record and proceedings of the said Court of Errors and Appeals there was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege or exemption specially set up and claimed under such clause by the said Frederick Lang, plaintiff in error, manifest error hath happened to the great damage of the said Frederick Lang, plaintiff in error as by his complaint appears; We being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then, under your seal, you distinctly and openly send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the
202 same in the said Supreme Court at Washington on the twenty-seventh day of December next, that the record and proceedings aforesaid being inspected, the said Supreme Court may further cause to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the twenty-seventh day of November in the year of our Lord one thousand nine hundred and seven.

H. D. OLIPHANT, *Clerk.*

ALAN H. STRONG,
Att'y for Pl't'ff in Error.

203 [Endorsed:] Supreme Court of the United States. Frederick Lang *v.* The State of New Jersey. Writ of error to N. J. Court of Errors & Appeals. Ret'ble December 27, 1907. Alan H. Strong, Atty., New Brunswick, N. Jersey. Allowed November 27, 1907. W. J. Magie, Chancellor & Presiding Judge Court of Errors, &c. of New Jersey.

The Answer of the Judges of the Court of Errors and Appeals of the Last Resort in all Causes in the State of New Jersey Within Named.

The record and proceedings whereof mention is within made with all things touching and concerning the same we do certify and send to the Supreme Court of the United States in a certain schedule to this writ annexed as within we are commanded.

W. J. MAGIE,
Chancellor and Presiding Judge of the Court of Errors and Appeals of New Jersey.

204 UNITED STATES OF AMERICA, *ss.:*

To the State of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the twenty-seventh day of December next, pursuant to a writ of error filed in the Clerk's office of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, wherein Frederick Lang is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William J. Magie, Chancellor and President Judge of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey this twenty-seventh day of November in the year nineteen hundred and seven.

W. J. MAGIE,
Chancellor & Presiding Judge of the Court of Errors, &c., of the State of New Jersey.

205 [Endorsed:] Supreme Ct. of United States. Frederick Lang *v.* The State of New Jersey. Citation. Ret'ble December 27, 1907. Alan H. Strong, Att'y, New Brunswick, N. J. Service acknowledged on the State of New Jersey this 27th day of November, 1907. George Berdine, Prosecutor, &c.

206 United States Supreme Court.

FREDERICK LANG, Plaintiff in Error,
v.
THE STATE OF NEW JERSEY, Defendant in Error.

On Error to Court of Errors and Appeals of New Jersey.

The said plaintiff in error, hereby, in accordance with the provisions of the tenth rule of the Supreme Court of the United States, makes the following statement of the error upon which he intends to rely upon the hearing of the above entitled writ of error, and of the parts of the record which he thinks necessary for the consideration thereof, that is to say:

The error upon which the said plaintiff in error will rely consists in the over-ruling of the objections to the indictment (made by said plaintiff in error in the trial court and insisted upon by him in the Supreme Court and in the Court of Errors and Appeals of said State) upon the ground that two of the grand jurors by whom the indictment was found, were over the age of sixty five years at the time of being sworn upon said grand jury, and thereby disqualified from such service under the statute of New Jersey, and the occurrence upon which the said indictment was based did not take place until after the swearing and empaneling of the said grand jurors, as is more fully stated in the assignments of error filed in said Court of Errors and Appeals of New Jersey upon the allowance of the writ of error from this Court.

The parts of the record which the plaintiff in error thinks necessary for the consideration of said error, are the following:

Order August 10, 1906, by W. J. Magie, Chancellor for writ of error out of New Jersey Supreme Court to Middlesex Over.

207 Writ of Error out of New Jersey Supreme Court August 11, 1906, returnable November, 1906, with return thereto, including indictment and judgment record thereon.

Testimony and proceedings at the trial July 16, 1906, only down to and including the exception to the sustaining of the demurrer to the defendant's plea in abatement and the direction of the Court that a plea of not guilty be entered.

Assignments of error in New Jersey Supreme Court filed December 6, 1906.

Causes for reversal in New Jersey Supreme Court filed February, 1907.

Judgment of affirmance in New Jersey Supreme Court entered June 15, 1907.

Opinion of New Jersey Supreme Court by Gummere, Chief Justice.

Writ of Error from Court of Errors and Appeals to New Jersey Supreme Court June 19, 1907, and return thereto.

Assignments of error in Court of Errors and Appeals filed July 3, 1907.

Judgment of affirmance in Court of Errors and Appeals November 18, 1907.

Petition for writ of error from Supreme Court of United States and allowance of same, filed November 27, 1907.

Writ of Error from Supreme Court of United States and return thereto.

Assignments of error accompanying said petition filed November 27, 1907.

Opinion of Court of Errors and Appeals by Justice Garrison.

Citation returnable December 27, 1907.

208 Bond, affidavit of justification and approval November 27, 1907.

Dated March 24, 1908.

ALAN H. STRONG,
Attorney for Plaintiff in Error.

I acknowledge due service of a copy of the above.

GEORGE BERDINE,
Prosecutor, &c., Attorney for Defendant in Error.

209 [Endorsed:] 649. 21052. Supreme Court of the United States. Frederick Lang *v.* The State of New Jersey. On Error to Court of Errors & Appeals of New Jersey. Statement of Error relied on & of portions of record required. Alan H. Strong, Att'y for Pl't'ff in Error.

210 [Endorsed:] File No. 21,052. Supreme Court U. S. October Term, 1907. Term No. 649. Frederick Lang, Pl'ff in Error, *vs.* The State of New Jersey. Statement by counsel for plaintiff in error of error relied upon and designation of parts of record to be printed & proof of service of same. Filed March 25th, 1908.

211 United States Supreme Court.

FREDERICK LANG, Plaintiff in Error,
v.
THE STATE OF NEW JERSEY, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed that the printing of the record in the above entitled cause shall consist only of the portions thereof specified in the statement dated March 24, 1908, and filed in the office of the Clerk of this Court, and upon which due service of a copy is acknowledged by George Berdine, Prosecutor, &c., Attorney for the defendant in error.

And it is further agreed that in printing the assignments of error filed in the New Jersey Supreme Court December 6, 1906, there shall be omitted the fourth to the twenty-fifth assignments inclusive, and that in printing the causes for reversal filed in said Court February, 1907, all except the first of said causes shall be omitted.

Dated March 25, 1908.

ALAN H. STRONG,
Attorney for Plaintiff in Error.
GEORGE BERDINE,
Attorney for Defendant in Error.

212 [Endorsed:] 649. 21052. U. S. Supreme Court. Frederick Lang, *v.* The State of New Jersey. On Error to New Jersey Court of Errors & Appeals. Stipulation. Alan H. Strong, Attorney.

213 [Endorsed:] File No. 21052. Supreme Court U. S. October Term, 1907. Term No. 649. Frederick Lang, P. E., *vs.* The State of New Jersey. Stipulation as to printing record. Filed Mch. 27, 1908.

Endorsed on cover: File No. 21,052. New Jersey court of errors and appeals. Term No. 649. Frederick Lang, plaintiff in error, *vs.* The State of New Jersey. Filed March 3d, 1908. File No. 21,052.

Office Supreme Court, U. S.
FILED.
MAR 9 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 649.

FREDERICK LANG, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW JERSEY.

MOTION TO ADVANCE.

GEORGE BERDINE,
Counsel for Defendant in Error.

No. 21,052.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 649.

FREDERICK LANG, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW JERSEY, DEFENDANT IN ERROR.

ON WRIT OF ERRORS TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

NOTICE OF MOTION TO ADVANCE.

To ALAN H. STRONG, Esq.,
Attorney for Plaintiff in Error:

Take notice that I shall move the Supreme Court of the United States, at the court-room of the said court, in the city of Washington, on Monday, the sixteenth day of March, nineteen hundred and eight, at twelve o'clock in the forenoon, to advance the above-entitled cause for argument, and upon such notice I shall present to the court in support thereof the statement and reasons and affidavit hereto annexed.

Yours truly,

GEORGE BERDINE,
Prosecutor of the Pleas of Middlesex County.

Dated March 9, 1908.

Statement and Reasons on Motion to Advance.

1. The plaintiff in error was convicted of murder in the first degree at the April term, 1906, of the Court of Oyer and Terminer of the County of Middlesex, and State of New Jersey, and was, in the month of August, 1906, by His Honor, Francis J. Swayze, one of the justices of the Supreme Court of the State of New Jersey, sentenced to death.

2. In the month of September, 1906, plaintiff in error sued out a writ of error removing his judgment of conviction into the Supreme Court of the State of New Jersey, which writ of error was returnable at the November term, 1906, of the Supreme Court of New Jersey.

The error assigned for reversing the judgment was that two of the Grand Jurors which found the indictment upon which the said Frederick Lang was convicted were over the statutory age of sixty-five years. This objection was raised before the said Court of Oyer and Terminer at the trial, and was overruled because the statute of the State of New Jersey required such an objection to be taken before the administration of the oath to the Grand Jurors, and that it was too late to take advantage of any such disqualification after the Grand Jury were sworn.

The plaintiff in error claimed at the trial that such ruling of the trial justice was in violation of his rights under the Constitution of the United States. The writ of error was argued at the February term (1907) of the Supreme Court, and at the June term (1907) Chief Justice Gummere delivered the unanimous opinion of the Supreme Court affirming the judgment of the Oyer and Terminer, holding that the statute of New Jersey forbidding challenges after the Grand Jury had been sworn was constitutional.

This judgment of the Supreme Court was removed to the Court of Errors and Appeals of the State of New Jersey,

and, after argument, the unanimous opinion of the last mentioned court was delivered by Justice Garrison, affirming the judgment of the Supreme Court. The plaintiff then sued out a writ of error removing the judgment to the Supreme Court of the United States, which was returnable December 26, 1907.

It is respectfully urged that this cause should be advanced for the following

Reasons.

1. That the speedy determination of this writ of error is necessary for the proper enforcement of the criminal laws of the State of New Jersey.

2. That the alleged Federal question involved in this case is that the defendant has been denied his rights under the Fourteenth Amendment of the Constitution of the United States.

But it has been determined in a multitude of cases that that amendment does not deprive a State from adopting its own methods of criminal procedure.

All of which is respectfully submitted.

GEORGE BERDINE,
Prosecutor of the Pleas of Middlesex County.

UNITED STATES SUPREME COURT.

FREDERICK LANG, *Plaintiff in Error,*

vs.

THE STATE OF NEW JERSEY, *Defendant in Error.*

On Writ of Error.

Affidavit.

STATE OF NEW JERSEY,
Middlesex County, ss:

GEORGE BERDINE, of full age, being duly sworn according to law, on his oath says that he is Prosecutor of the Pleas of the County of Middlesex and as such prosecuted the case of the State of New Jersey against Frederick Lang for murder; that the testimony at the trial showed that Lang shot and killed his niece, Katie Gordon, a young girl of about eighteen years of age, in a fit of jealousy for not marrying him. At the trial the defendant did not offer any testimony in refutation of the testimony produced on behalf of the State, and Lang was convicted of murder in the first degree. After the case was moved for trial, Lang's counsel moved to quash the indictment because two members of the Grand Inquest, which found the indictment were over sixty-five years of age, and that as the crime was not committed until after the Grand Jury was empanelled and sworn, Lang did not have the opportunity to raise this defense before the Grand Jury was sworn. The Honorable Francis J. Swayze, one of the justices of the New Jersey Supreme Court presided at this trial and disallowed the objection. The unanimous opinion of the New Jersey Supreme Court and Court of Errors and Appeals affirmed the judgment of conviction.

Deponent further says that he believes the speedy determination of this appeal is necessary for the proper enforce-

ment of the criminal laws of the State of New Jersey, and that no right of the plaintiff in error under the Fourteenth Amendment has been denied to him; that the judgment is in all respects valid and in absolute conformity to law.

GEORGE BERDINE.

Sworn and subscribed before me this 9th day of March, A. D. 1908.

JOHN KEAN,
Master in Chancery of New Jersey.

[Endorsed:] Supreme Court of the United States. Frederick Lang, pl't'ff in error, *vs.* State of New Jersey, def't in error. On writ of error to court of errors and appeals of New Jersey. Motion to advance. Notice and statement and reasons. George Berdine, prosecutor of the pleas Middlesex County, New Jersey, for defendant in error. Due and legal service hereof is acknowledged. Alan H. Strong, att'y of pl't'ff in error.

No. 649.

Supreme Court, U. S.
FILED
APR 6 1908
JAMES H. McKENNEY,
Clerk.

J. HEIDINGSFELD, PRINTER, NEW BRUNSWICK, N. J.

United States Supreme Court.

FREDERICK LANE,
Plaintiff in Error.
v.
STATE OF NEW JERSEY,
Defendant in Error.

On Error to New Jersey Court of Errors & Appeals.

BRIEF FOR PLAINTIFF IN ERROR.

ALAN H. STRONG,
Of Counsel with Plaintiff in Error.

United States Supreme Court.

FREDERICK LANG, *Plaintiff in Error.* v. STATE OF NEW JERSEY, *Defendant in Error.*	On Error to New Jersey Court of Errors & Appeals.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error was convicted of murder in the first degree and sentenced to death in the Court of Oyer and Terminer of Middlesex County, New Jersey. He removed said judgment into the Supreme Court of New Jersey by writ of error (page 10) allowed by the Chancellor. (Page 9.) The Supreme Court (page 2) affirmed the judgment and the defendant took a writ of error (page 1) out of the Court of Errors and Appeals to review said affirmance; and upon that writ of error the Court of Errors and Appeals affirmed the judgment of the Supreme Court (page 32).

The present writ of error (page 42) is directed to the Court of Errors and Appeals, being the highest Court of the State of New Jersey, to review its judgment of affirmance upon the ground that thereby the plaintiff in error has been denied the equal protection of the laws.

At the trial of the case in Middlesex Oyer, the defendant was permitted to withdraw the plea of not guilty (which had been entered for him by direction of the Court prior to the assignment of counsel) for the purpose of attacking the indictment (page 17.).

A motion to quash was then made upon the ground that the homicide upon which the indictment was based oc-

curred on the twentieth day of April, nineteen hundred and six, which was after the empanelling of the grand jury by which the indictment was found, the said grand jury having been empanelled on the first Tuesday of April and two of the grand jurors sworn upon said grand jury on April third, being at that time, above the age of sixty-five years. Said two grand jurors, Messrs. Warne and Bennett were then sworn on the part of the defendant and Mr. Warne testified that he was past seventy-two years of age; had served as a member of the grand jury in finding the indictment against Lang; was present at the hearing of the witnesses and voted for it. Mr. Bennett testified that he was sixty-seven years of age and also took part in the investigation of the charge as member of the grand jury (pages 18-19).

The minutes of the Court were put in evidence showing the empanelling of the grand jury and the swearing of Messrs. Bennett and Warne as members of it on April third (page 19). There was no contradiction of the fact that the grand jurors were of the ages stated and it was admitted on the part of the State that the date of the offence was the twentieth day of April as alleged in the indictment. (page 19.)

The Court over-ruled the motion to quash and exception thereto was duly taken (page 21). Thereupon the defendant by his counsel, presented and filed a plea in abatement duly verified setting up the same matter; to which plea the State demurred and the Court sustained the demurrer (pages 15, 21). To that ruling also exception was taken (page 21).

In the plea in abatement (pages 13-15) it is alleged that the finding of the indictment under the circumstances stated, was not due process of law and also that thereby the equal protection of the laws was denied to the defendant contrary to the first section of the Fourteenth Amendment to the federal constitution.

In the New Jersey Supreme Court the defendant, among other assignments of error, alleged that by being forced to answer the indictment, notwithstanding his objections made by motion to quash and plea in abatement as above stated, he had been deprived of his liberty and been adjudged to be deprived of his life without due process of law, and had been denied the equal protection of the laws,

contrary to and in violation of the first section of the Fourteenth amendment to the Constitution of the United States (pages 21-22).

The same error was also specified as cause of reversal in said Court (page 23). It was also relied upon in the second assignment of errors in the Court of Errors and Appeals in similar terms (page 3). The assignment of errors in this Court presents the same question (pages 38-39).

The statute of the State of New Jersey prescribing the qualifications of grand and petit jurors, is found in *2 General Statutes of New Jersey, page* 1853, *section* 47, and is as follows:

"That every person summoned as a grand juror in any court of this state, and every petit juror returned for the trial of any action or suit of a civil or criminal nature, shall be a citizen of this state and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person, who, is not so qualified, shall be summoned as a grand juror, or as a juror on the trial of any such action in any of the courts of this state, or if any person shall be summoned as a petit juror at any stated term of any court of this state, who has served as such at any of the three stated terms next preceding that to which he may be summoned, it shall be good cause of challenge to any such juror, who shall be discharged upon such challenge being verified according to law, or on his own oath of affirmation in support thereof; provided, that no exception to any such juror on account of his citizenship or age, or any other legal disability, shall be allowed after he has been sworn or affirmed."

The insistment of the plaintiff in error both on his motion to quash and in his plea in abatement at the trial and upon his successive writs of error to the Supreme Court and to the Court of Errors and Appeals of the State, has always been and now is that by compelling him to answer to an indictment found by a grand jury empanelled before the occurence upon which the indictment is based two members of which grand jury were disqualified by being over the statutory age, (notwithstanding the objections made by the defendant at the earliest practicable opportunity, and upon all occasions subsequently during the course of the litigation.)

the State of New Jersey has denied to the said defendant the equal protection of its laws, contrary to the Fourteenth amendment to the Federal Constitution.

The Supreme Court of the State over-ruled this objection upon three grounds. viz.;

First: That the privilege of interposing a challenge on such a ground affords no protection within the meaning of the Federal constitution (page 5).

Second: Assuming that some benefit is conferred by the privilege to persons whose alleged violations ante-date the empanelling of the grand jury, and that such benefit is not shared in by those charged with having committed crimes while the grand pury is in session, this does not constitute a violation of the equal protection clause of the Fourteenth Amendment (page 6).

Third: That if there was error in the refusal of the Trial Court to quash the indictment this was not ground of reversal because it did not prejudice the defendant in maintaining his defence upon the merits (pages 6-7).

The Court of Erros and Appeals *expressly waived* (page 31) *any decision of the points so decided by the Supreme Court* and rested its decision entirely upon the ground, as stated in the opinion of Justice Garrison, that the object of the statutory provisions is to secure an efficient and representative body of citizens to take part in the due administration of the law for the benefit of all who are entitled to its protection, and not specially or even primarily for the benefit of those charged with its violation, and that the classification on which the statute rests is co-extensive with the scope of its protection, being nothing less than the entire community, law abiding as well as law breaking (page 24).

The third ground upon which the Supreme Court placed its decision, namely, that the error, if any, was not one which prejudiced the defendant upon the merits and therefore was not ground of reversal, is eliminated for all present purposes since it was not adopted by the State Court of last resort

If the plaintiff in error is to be defeated upon that ground, he is entitled to have it expressly passed upon by the Court of last resort of the State; and since the Court of Errors and Appeals has placed its decision wholly upon the ground that there has been no violation of the Four-

teenth amendment, we are entitled to have the latter question decided here without prejudice from anything which the Supreme Court may have held, but which the Court of Errors did not hold.

The pith of the opinion of the Court of Errors and Appeals is that the statute above quoted, prescribing the qualifications of jurors is not intended specially for the benefit of persons accused of crime, but is in the interest of the whole community, any member of which may challenge for want of such qualifications before the empanelling of the grand jury, but not afterwards.

Therefore, it was held that there was no classification, and hence no discrimination such as is prohibited by the Fourteenth Amendment.

The construction thus put upon the New Jersey statute by the highest court of that State, is of course unassailable here. But the question, whether adopting that construction there has been a denial of the equal protection of the laws, is one upon which the decision of the Court of Errors and Appeals of New Jersey is not controlling but which it is the peculiar function of this Court on writ of error to review.

I.

THE RIGHT TO CHALLENGE PERSONS SUMMONED AS GRAND JURORS BUT WHO DO NOT POSSESS THE STATUTORY QUALIFICATIONS IS PART OF THE PROTECTION OF THE LAWS TO PERSONS WHO ARE LIABLE TO BE INDICTED.

To challenge a grand juror for any ground of disqualification is the right at common law of any one who is under prosecution for any crime whatsoever.

2 *Hawkins P. C. Chap.* 25 *Sec.* 16.
1 *Bishop Crim. Pro.* (3d Ed.) *Sec.* 676.
4 *Crim. Law Magazine* (March 1883) 171 &c.

According to all the authorities if any one of the grand jury who find an indictment is disqualified he vitiates the whole, though never so many unexceptionable persons join with him in finding it.

2 Hawkins P. C. Chap. 25, Sec. 28.
1 Bishop Crim. Pro. Sec. 749; Sec. 3884. (3d Ed.)
1 Chitty Crim. Law 307.
State v. Rockafellow, 1 Halstead 332.

And for that cause a conviction upon such an indictment (if objection was duly taken) will be reversed on error.

State v. Hoffmann, 42 Vroom, 285.
Growley v. United States, 194 U. S. 461.
United States v. Gale 109 U. S. 65.

The Court of Errors and Appeals does not hold that the requirements of this statute with respect to grand jurors are not of importance to a person accused of crime, nor that they are not ground of challenge by such person.

Justice Garrison in the opinion says: (page 28).

"I am not, of course, suggesting that persons who are apprehensive of being indicted may not be present if they choose at the opening of court, and challenge any grand juror upon any of the grounds set forth in this statute; but I am insisting that, while such rights exist, it is not confined by the statute to the particular class to which such persons belong or intended for their sole benefit and protection."

The fact that the right of challenge, which at common law was restricted to persons interested, is under the New Jersey statute extended to the whole community does not in the least impair the right of a person accused not only to challenge but if necessary to follow up the challenge by writ of error.

The statute requires that the juror, grand or petit, shall be a citizen presumably because citizenship implies some knowledge of our laws and institutions and of the duties of a juror. This is a matter of concern to a defendant.

It requires also that the juror shall be a resident of the county, doubtless because a resident best represents the sense of the community in which he dwells and may best conduct an inquiry into the circumstances of an alleged crime. This also is of importance to a defendant.

It is further required that the juror shall be above the age of twenty one years, the age of majority fixed by law for purposes of contract, and other purposes. Obviously

the intention of this requirement is to insure maturity of judgment in the juror. But for this the jurors might be boys.

So when we come to the requirement immediately involved in this case, that the grand juror or petit juror shall be under the age of sixty-five years, it also rests upon considerations important to the defendant. The purpose is to guard against the weakness of age as well as the immaturity of youth. Since in extreme age the faculties approximate the condition of childhood, it is as reasonable to fix a maximum as a minimum age,—to guard against senility as well as against youthful immaturity.

Doubtless the age of sixty-five may seem somewhat early to fix as the limit for service as a juror, but if it is conceded that the fixing of some age is important it is entirely for the legislature to determine what age shall be fixed. And though it may not be possible in any case to show that the fact of the juror being above the lawful age has worked injustice to the defendant, he is not required to show it. It is enough that a statute has been transgressed which was enacted, in some measure at least, for his benefit. The due observance of that statute is part of the protection of the laws, to which equally with all others in like circumstances, he is entitled under the guaranty of the Fourteenth Amendment.

II.

EQUAL PROTECTION OF THE LAWS REQUIRES THAT NO PERSON SHALL BE INDICTED WITHOUT HAVING HAD AN OPPORTUNITY TO CHALLENGE MEMBERS OF THE GRAND JURY WHO ARE DISQUALIFIED.

All are entitled to this protection who stand in like need of it.

One may not be denied the right which others enjoy of excluding disqualified persons from the grand jury by which he may be indicted merely because the matter for which he is prosecuted occurred after the grand jury was sworn. Nor does it help the matter to say that all persons whose alleged offences are subsequent to the empanelling of the grand jury are subject to the same deprivation. *Gulf & R. R. v. Ellis* 165 *U. S.* 150.

In *Connolly v. Union Sewer Pipe Co.* 184 *U. S.* 540, 560, this Court said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this Court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.....But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this..... No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.....It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.' Gulf C. & S. F. R. Co. v Ellis, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co. 183 U. S. 79."

In *Ohio ex rel. Lloyd v. Dollinson*, 194 *U. S.* 445, 447, it was said that the contention that the statute there in question violated the Fourteenth Amendment could only be sustained "if the statute treat the plaintiff in error differently from what it does others who are in the same situation as he—that is in the same relation to the purpose of the statute."

There is nothing in the fact of there being a grand jury in existence at the time of the commission of the alleged offence which has any relation to the purpose of the statute to secure a representative and efficient body of men as grand jurors, or which affords any basis for classification discriminating as to the right of objection between offences before and those after the swearing of the grand jury.

Accordingly Mr. Bishop, after mentioning the right of

persons under prosecution to challenge at the time of the organization of the grand jury, proceeds to say:

"And if such person chooses not to avail himself of this opportunity, and an indictment is found against him, he cannot afterward according to the more common rulings and by statute in many of our States, take an objection to the panel or a particular juror which he was then entitled to, but neglected to bring forward.

"But there are circumstances such as where the grand jury was organized before the offense was committed, and various others wherein the defendant could not have participated in the organization, yet the indictment was rightfully found. *Some method of taking an objection other than by challenge must therefore be open in such a case."*

1 *Bishop Crim. Pro.* (3d Ed.) *Sec.* 877-879.
U. S. v. Gale, 109 *U. S.* 65, 67.
Carter v. Texas, 177 *U. S.* 442, 447.
Castleberry v. State, 69 *Ark.* 346.

I have not found any case where this question has been discussed in the light of the Fourteenth Amendment except *State of New Jersey v. Corrigan,* 139 *Fed.* 768. In that case all of the intimations are favorable to our present contention.

III.

THE CONSTRUCTION ADOPTED BY THE COURT OF ERRORS AND APPEALS DOES NOT AVOID THE DIFFICULTY.

There is still an alleged discrimination. The Fourteenth Amendment ignores all forms and penetrates all disguises. It has nothing to do with the purpose of the law except as the purpose is developed in the operation of the law. The magna charta of these latter days, it stands in the last resort as the immovable barrier to every arbitrary or unequal exercise by a State of any of the powers of government.

It is no answer to say that because the statutory qualifications are not specially designed for the benefit of defendants, there has been no classification. The statute relates to a subject in respect to which classes necessarily exist.

It is inevitable that such a statute should affect persons accused of crime in a manner and degree altogether peculiar to them. No argument can be necessary to show that persons whose alleged mis-deeds are to be considered by a particular grand jury have an intensely practical interest in the membership of that body, which is as different as possible from the theoretical interest of the rest of the community.

Such persons occupy the position of parties to a litigation and constitute a class distinct from all others. The purpose and scope of the act being to secure a representative and efficient body of men to pass upon allegations of crime, persons who may be accused before them stand in a special and peculiar relation to this purpose.

No ingenuity can obscure the fact that this defendant has been convicted and sentenced to death upon an indictment found by a grand jury, two members of which were disqualified (and would have been rejected upon challenge); and this notwithstanding that on every possible occasion since the commission of the crime and by every method known to the law, he has protested against this illegality.

To say that he has been given the equal benefit of the laws is to assert what is at most a fiction of law palpably contrary to the admitted facts. The Fourteenth Amendment is not satisfied by fiction or abstraction. It is in the last degree practical.

When this defendant entered the class of persons accused, instead of having extended to him the rights enjoyed by others of that class, he found one important right foreclosed against him. Merely because the grand jury had already been empanelled he could not object to their membership, although two of them were disqualified.

When his interest first arose the time for challenge had already passed. When it became of consequence to him to object he was told that his objection was too late.

But it is said that the defendant *as a member of the community*, might have challenged the disqualified jurors before they were sworn. Nothing had then occurred for which he was subject to be indicted. He had no interest in the composition of the grand jury. No human forsight could then anticipate that it would ever be a matter of the slightest moment to him how that grand jury should be composed. His

mind in all probability was not directed to the subject at all. The result of the legal adjustments sanctioned by the Court of Errors and Appeals is that persons situated as this defendant are compelled to make objection to grand jurors at a time when they have no interest and no reason to suppose that they ever will have an interest in the proceeding.

Thus they are deprived of the powerful aid of the motive of self interest and self preservation at an important juncture.

The right and opportunity to challenge in the absence of a personal interest prompting to the exercise of the right, is to all intents and purposes as if the right did not exist. Certainly it is not the equivalent of the right enjoyed by a person who is at the time under accusation of crime, in whom the instinct of self-preservation is fully aroused and at work, and who has probably already secured the advice of counsel.

The protection of the laws is not equal when to one is given opportunity under the spur of the most powerful motive by which a man can be actuated, and to another, opportunity divorced from all interest and all motive. In effect the law as expounded by the Court of Errors and Appeals imposes upon this defendant a constructive waiver of this feature of the protection of the laws *in advance of the exigency which renders the protection desirable.*

This is a violation of the Fourteenth Amendment. The provision is that no State shall deny &c. the equal protection of the law.

That means that when the need exists the protection shall be present and shall not be denied. It may be waived then by failure to avail of the protection by reasonable objection. *But it is not in the power of the State to provide that a certain course of conduct—the doing or not doing of certain things,—beforehand shall affect or impair the right to equal protection of the laws when the occasion shall afterward arise.*

This defendant had no need for the protection by challenge of grand jurors until the occurence of April 20th for which he was indicted; nothing that he did or failed to do on April 3d, when the grand jury was organized, could enable the State to deny to him the equal protection ap-

propriate to his situation after he became liable to indictment.

Again, how would the theory of the Court of Errors and Appeals apply to the case of a person not a citizen or resident of the State, or of the United States at the time of empanelling the grand jury but who afterward during his temporary presence in the State has committed an offence (or is alleged to have done so)? What opportunity of challenge is afforded to such a one?

We do not say that this statute is unconstitutional. Every word of it may have effect without conflicting with the Fourteenth Amendment. But, since by the provisions of the act no objection can be made to the competency of a juror after he has been sworn, *it follows that a grand jury vitiated by the presence of disqualified members cannot take cognizance of an offense alleged to have occurred after they were empanelled.*

There is no need for the existing grand jury to act on such a case. The utmost delay will be but a few months when another grand jury will be empanelled to which defendant will have full opportunity of challenge. The law as expounded by the Court of Errors and Appeals vests in the prosecuting authorities the arbitrary power to bring the charge before either a grand jury empanelled before or one empanelled after the offense; thus at their pleasure depriving or not depriving a defendant of his challenges. It is contrary to the Fourteenth Amendment that a person should hold any of his rights at the mere will of another.

Yick Wo v. Hopkins, 118 U. S. 356.

The principle of the decision is not to be limited to these statutory disqualifications. The proviso to section 6 of the jury act (above quoted) in fact says that no exception on account of citizenship or age *or any other legal disability* shall be allowed after the juror has been sworn or affirmed.

It is true that the Court of Errors and Appeals in the conclusion of its opinion, (page 31, bottom), reserves the question whether the words "any other legal disability" include the common law grounds of prejudice, malice and the like, and if so what would be the rights and remedies of an indicted person *who had had no opportunity* to challenge a given grand juror upon these personal grounds. But, if it is to be established that a person may be required to make

his challenges before the jurors are sworn, or lose the right to object to any lack of qualification in case he may be accused before them upon some matter subsequently occurring, this principle will apply as well to challenges for prejudice, ill-will or malice as any other ground. It will apply also to race discrimination, and in fact to every conceivable ground upon which objection might be made to individual jurors or to the jury as a whole.

If this particular statute has not that scope, another statute might be passed which should have. It matters not whether the grounds of objection arise under a State or a Federal statute or at common law. If the theory of a constructive waiver in advance is sound, it may be applied to all if the legislature shall so enact.

It is just as reasonable to hold that a person indicted for an occurance which took place after the organization of the grand jury and who then finds that it is composed of his enemies, has had an opportunity for challenge as to hold that this defendant has had.

It may be suggested that it was of little practical consequence to the defendant that two of the grand jurors were over the statutory age. So it might have been said in *Rogers v. Alabama*, 192 *U. S.* 226, that the presence of one or more colored men who might *perhaps*, but not necessarily, have been drawn upon the grand jury, if the unlawful means complained of had not been used to exclude them, would have made no difference as to the finding of the indictment.

But it is settled by that case and others that the slighest infringement of the rights of a defendant (whether resulting from race discrimination or otherwise) in the drawing of a grand or petit jury, will work a reversal of the conviction if objection is seasonably made. If it is permissible to overlook the disqualification of one member of the grand jury it may be overlooked as to all. In that view the whole panel might be aliens and non-residents and boys or men of any age.

As was remarked in the opinion of this Court in *Crawley v. United States*, 194 *U. S.* 461, 474:

"If the objection in this case was not sufficient, then an objection made by plea in abatement prior to arraignment, that a majority or even all of the grand jurors returning an indictment against the accused, were disqualified by law,

would have been equally unavailing. *Such a result is not to be thought of.*"

The decisions of this court especially do not permit a constitutional right to be belittled. The attitude of the Court is expressed as follows, in the often quoted language of Justice Bradley:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be obsta principiis." (*Boyd v. U. S.* 116 *U. S.* 616, 635).

The case of *Carter v. Texas* 177 *U. S.* 442 is worthy of more than the passing reference made to it in the earlier part of this brief. In that case the defendant a colored man had been convicted of murder on an indictment found by a grand jury empaneled before the offense. Before pleading he made a motion to quash the indictment upon the ground that persons of his race had been excluded from the grand jury solely because of their race. This motion was denied, exception was taken and the case was brought to this court by writ of error. The code of Criminal Procedure of Texas provided that "*any person* before the grand jury have been empaneled may challenge the array of jurors or any person presented as a grand juror; *and in no other way* shall objections to the qualifications and legality of the grand jury be heard." This court reversed the conviction. Justice Gray delivering the opinion said (p. 447): "When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken either by plea in abatement or by motion to quash the indictment before pleading in bar. *United States v. Gale* 109 *U. S.* 65, 67" * * * "the grand jury had been empaneled before the commission of the offense for which the defendant was indicted. He therefore never had an opportunity to challenge the array of the grand

jury and was entitled to present the objection on which he relied by motion to quash." The New Jersey decisions are at variance as to the proper mode of taking advantage of the lack of statutory qualification of a grand juror after indictment found.

In *State v. Rockafellow* 1 *Halsted* 343 a plea in abatement setting up absence of freehold qualification in one of the grand jurors was sustained. The qualification in point of age stands upon on exact parity under the statute with the former freehold qualification.

Gibbs v. State 16 *Vroom* 379 seems to hold at least as to objections not founded upon express statute that the only remedy is by motion to quash.

In *State v. Hoffman* 42 *Vroom* 285, 287, it is pointed out that what Chief Justice Beasley said about the propriety of a motion to quash was *dictum*.

In the present case however (page 5) the Supreme Court followed the Gibbs case and held that the defendant's plea in abatement would not lie. The opinion by Chief Justice Gummere then proceeds as follows:

"But as he had been afforded no opportunity to interpose a challenge to either of the members of that body who were over the age of sixty-five years he was entitled to attack the legality of the body by a motion to quash, and the determination of the propriety of the trial court in overruling that motion requires a consideration of the meritorious question presented thereby."

It would seem therefore that the motion to quash the indictment was the proper remedy; and since the defendant was entitled to relief in some form, the court erred in refusing that motion. The Supreme Court and the Court of Errors and Appeals successively erred in their judgments of affirmance. The judgment of the Court of Errors and Appeals therefore should be reversed and the record should be remitted with directions that judgment be entered reversing the judgment of the Supreme Court and that judgment be entered in that court reversing the judgment of the Oyer, and that judgment be entered in the Oyer quashing the indictment.

ALAN H. STRONG,
Of Counsel with Plaintiff in Error.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 649.

FREDERICK LANG, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW JERSEY.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE BERDINE,
Prosecutor of the Pleas of Middlesex County,
New Jersey, for Defendant in Error.

(21,052.)

SUPREME COURT OF THE UNITED STATES.

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THE STATE OF NEW JERSEY, DEFENDANT IN ERROR.

ON ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This cause was tried before Mr. Justice Swayze, of the New Jersey Supreme Court, presiding in the Oyer and Terminer of the County of Middlesex.

The defendant was indicted for murder in the first degree, and on the 10th day of June, 1906, when first arraigned, pleaded, "I did shoot the girl;" whereupon the presiding justice ordered a plea of not guilty to be entered. (See judgment record.)

The case was moved for trial on the 16th day of July, 1906. The defendant withdrew his plea of not guilty, and pleaded in abatement of the indictment that two of the grand jurors who participated in the finding of the indict-

ment were over the age of sixty-five years, and that the alleged crime was committed after the grand jury had been sworn. The State demurred to the indictment, and the court gave judgment on the demurrer in favor of the State. (See the judgment record.)

The defendant then moved to quash the indictment for the same reason. This motion the presiding justice denied and signed a bill of exceptions.

ARGUMENT.

The General Statutes of New Jersey, page 1853, section 47, provides as follows:

> "That every person summoned as a grand juror in any court of this State, and every petit juror returned for the trial of any action or suit of a civil or criminal nature, shall be a citizen of this State, and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person who is not so qualified, shall be summoned as a grand juror, or as a juror on the trial of any such action in any of the courts of this State, or if any person shall be summoned as a petit juror at any stated term of any court of this State, who has served as such at any of the three stated terms next preceding that to which he may be summoned, it shall be good cause of challenge to any such juror, who shall be discharged upon such challenge being verified according to law, or on his oath or affirmation in support thereof; provided, that no exception to any such juror on account of his citizenship, or age, or any other disability, shall be allowed after he has been sworn and affirmed."

This statute has been judicially construed by the courts of New Jersey in several cases. Chief Justice Beasley, in Gibbs *et al. vs.* State, 16 Vroom, 382, said upon defendant's right to challenge as follows:

> "1. They had a right to challenge this grand jury, either as a whole or in part, on the grounds now stated

in their pleas; or, second, if an opportunity for doing this was not afforded to them, by reason of their ignorance that they would be proceeded against, or that the objections to the proceedings in question existed, then their right was to apply to the court, in the exercise of its discretion to quash the entire procedure against them. Nor in abstract speculation would an argument of any force arise from these premises that the remedies thus provided are so utterly insufficient and unreasonable that it must be presumed that a further remedy exists. For my part I can see no force whatever in such a suggestion. In the first place we are to remember that the right in question, and which, in some measure, the law should assuredly secure to the party, is not one that can be called an essential or fundamental right; it is not one necessary for the security of the person, life or property.

"The requisite that an accusation of this nature shall proceed from a grand inquest is the provision which the law makes against frivolous or malicious public criminations.

"The safeguards to such provisions, as I have said, consist in the right to challenge the grand jury and the right to move the court to set aside the proceedings. Are such safeguards unreasonably deficient? I am at a loss to see how any one can so consider. If a man is tried for his life and is convicted, and he then discovers that by the malice of the summoning officer the jury has been packed, and the trial has been a scheme to take his life, what remedy does the law give him in such an extremity? Absolutely none but an application to the discretion of the court to set the proceedings aside; and yet it is argued that this same remedy is inadequate in its application to a similar proceeding on the part of a grand inquest. I must repeat that I cannot concede that a right to put in the plea in question belongs to the defendants *ex debito justitiæ*. If it be a right, it must be one inherent in the established modes of legal procedure. And this I regard as the real question to be disposed of on this branch of the case.

"Nor do I think that these decisions, which disallow pleas founded on irregularities or errors in these pre-

liminary procedures, are in any respect out of harmony with the practice at the common law. Upon a careful investigation in this respect, I do not think there is any solid reason for believing that ever, under the prevalence of that system, a plea of this nature was sanctioned; and that it was not until the passage of the act of II Hen. IV, c. 9, that such a course of law was deemed admissible. This statute was enacted during the running of Hilary term of the King's Bench, and during that term it was held by the court in a case reported in the Year Books, II Hen. IV, c. 41, that a person outlawed on an indictment of felony might plead, in avoidance of it, that one of his indictors had been outlawed for felony. It has been generally supposed that this decision was grounded on the statute just referred to, and which act declares that all indictments found by persons other than those described in it, or by corrupt practices denounced by it, shall be absolutely void. A case, therefore, being within the purview of this law, it is obvious that the nullity of the proceedings could be set up in the form of a plea. Hawkins, in his Pleas of the Crown, vol. 4, Book 2, ch. 25, chap. 18, faintly raises a query whether this decision in the Year Books was based on this act of Parliament or on the common law, his reasons for such doubt being the proximity in time of the passage of the act and the decision, and the fact that the judges in announcing their judgment do not allude to the statutory law. But these grounds do not appear to be sufficient to call in question the general opinion which he says then prevailed, that this judicial resolution was founded on the act; for if no reference is made in the report in the Year Book to such act, neither is any reference made to any rule of the common law; the report of this point is comprised in two lines, and does nothing more than to express the judicial judgment. And with respect to any inference to be drawn from the proximity in time of the passage of the act of Parliament and the decision, it seems to me that it is much more reasonable to deduce from such a state of things the inference that the act formed the basis of the judgment, rather than to conclude that the very remarkable coincidence occurred

of the legislature and the court, about the same time and acting independently of each other, declaring the same mode of proceeding to be void.

"Nor, as I apprehend, are the views of Lord Coke on the subject left in the least uncertainty. It will be noted that unless, at the common law, an illegality in the formation or proceedings of the grand jury had the effect to render null its findings, a plea setting up such matters would have been plainly bad; yet it is clear beyond all gainsaying, that in Lord Coke's understanding, it was not the common law, but this statute of Henry IV that had the distinctive effect in question. In Scarlet's case, reported in 12 Rep., 98, he expresses himself with perspicuity on the point. The prisoner was indicted in that case for maliciously getting himself returned as a grand juryman, which was one of the practices condemned by the Statute of Henry IV., above referred to, and Lord Coke analyzes the act and says 'that it is partly affirmative of the common law and partly a new law.' He then proceeds to show that it is 'affirmative of the common law' when it directs that no indictment shall be found 'by any person named to the justices, but by the request of lawful people of the King, returned by the sheriff.'

"And in conclusion, he declares that 'the said act II Hen. IV hath made a new law, *scilicet*, that any indictment found against the act shall be void.' It will therefore be observed that in substance the great common-law commentator says this: That by the common law an inquest was required to be held by the king's lawful liegepeople—*probi et legales homines*—and not by persons who obtained themselves to be nominated for malicious purposes, and to this extent the statute in question was in affirmation of the existing law; that the common law did not, by reason of the grand jury not being constituted in this manner, avoid the indictments which were found, but that the act refered to had that effect, and was in this particular introductory of a new rule of law.

"And that this was the point of view in which the subject was regarded by the judges in Withipole's case, Croke Car., 134, is apparent from the entire scope of the discussion. The plea in that case was

> that one of the grand jury had nominated himself, and another had been outlawed, and was, therefore, not *probus et legalis homo*. Nevertheless, the consideration of the matter went entirely on the meaning of the act of Parliament, and made no illusion to any general principle of law that could be considered applicable to such a defense."

And in State *vs.* Hoffman, 42 Vr., 285, the Court of Appeals again declared that the objection presented by the motion to quash, on the ground of lack of qualification of one of the grand jurors, because he was over the age of sixty-five years, which would have been good by way of preliminary challenge, came too late, after the juror was sworn, and was properly overruled by the trial court.

And finally the Court of Appeals, in the case of the State *vs.* Lang, 68 Atl. Rep., 210, says:

> "Not only does the provision in question fail to afford any practical protection to the class for whose special benefit it is said to have been enacted, but it does not even in theory undertake to afford any measure of protection to the only meritorious members of such class, namely, those who, being innocent of crime, are ignorant of the fact that they are even suspected, for the hypothesis under review goes no further than to assume that the statute is of practical benefit to those who are either conscious of guilt or are under apprehension of indictment. This, however, leaves out of consideration all persons whom, being absolutely innocent, have no reason to apprehend indictment. Admittedly these persons would derive no benefit at all from the momentary opportunity to challenge afforded by this statute; so that we have, as a culminating absurdity, that the legislature has extended a special privilege to such members only of the putative criminal class as are either guilty of crime, or are conscious of being likely to be indicted therefor, but has provided none at all for those who, being innocent, are not conscious of the need of such protection. Indeed, nothing could be more fantastical than the picture of a concourse of persons

> apprehensive of indictment gathered at the opening of court to see that the grand jury was composed of resident citizens of the proper age. The irony of such an imaginary concourse is that of those actually under accusation the most part would be in jail; that of those conscious of guilt, but not yet incarcerated, the most part would have fled the jurisdiction, while of those who were conscious neither of guilt nor of accusation the most part would be elsewhere attending to their ordinary affairs."

It is respectfully submitted that the statute of the State of New Jersey prescribing the qualifications of grand jurors, the manner in which the challenge for any disqualification must be made, does not deprive the defendant of any "fundamental or all-important right," especially so since in Brown *vs.* State, 33 Vr., 666, it is declared that every defendant in a criminal trial is entitled to an impartial jury, free from factual bias, and affords to every defendant ample protection against a partial, or corrupt, or illegal grand or petit jury, and that therefore the statute is clearly within the term of due process of law.

II.

The forty-seventh section of the jury act above quoted does not in the case *sub judice* violate the Fourteenth Amendment. A State law is not within the amendment if it do not infringe "fundamental and all-important rights," or if it be based on "municipal considerations" alone, if the class upon whom the law operates is not an arbitrary and actually unreasonable one.

First. The right to *principal* challenge is not a fundamental and all-important right.

Hayes *vs.* Missouri, 120 U. S., 68.
Proff. Jury Trial, Sec. 106.
12 Ency. Pl. & Prac., 475.
1 Bishop Crim. Pr., 941.

In Howard *vs.* Kentucky, 200 U. S., 173, it was said:

> "It may be admitted that the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights. In giving them protection, however, it was not designed to interfere with the power of the State to protect the lives, liberty, and property of citizens, nor with the exercise of that power by the State in administering the provisions of law. The accused cannot complain if he is tried by an impartial jury. He can demand nothing more. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional rights of the accused are secured."

Plaintiff in error does not allege that the grand jurors over sixty-five were not impartial.

Second. The statute is based on "municipal consideration" alone.

Mr. Justice Bradley, in Lewis *vs.* Missouri, 101 U. S., 22, said:

> "A statute would not be unconstitutional * * * if based on municipal consideration alone and on a regard to the welfare of all classes within the particular territory or jurisdiction. The municipal considerations of this law are pointedly stated by Mr. Justice Garrison in delivering the opinion of the Court of Appeals of New Jersey in the case at bar, and renders superfluous discussion on that topic."

In McQuellin *vs.* The State, 8 S. & M., 587-597, Chief Justice Sharkey upheld the policy of allowing objections to the qualifications of grand jurors to be made after indictment found, and declared that the high public policy required such privilege to the accused.

In Kane *vs.* The State, 86 Miss., 505, the Supreme Court of the same State said that a statute of that State which foreclosed such objections after the impanelling of the grand

jury was the result of the mischiefs which had been experienced by the opposite policy. He said:

> "A fair and impartial jury every man has a right to demand; but who and what particular person shall serve upon the jury, grand or petit, is not one of his rights? If the jury be fair and impartial, his constitutional rights are neither denied nor in any manner abridged. The rule which required objections to be preferred in a certain time is not divined or intended for the benefit alone of those accused of crime, but chiefly to secure the prompt enforcement of the criminal law of the State for the benefit of society, and that the reasons which necessitated the adoption of this statute have been clearly pointed out in the decisions of this court."
>
> See also Rawlins *vs.* Georgia, 201 U. S., 640, which discusses the power of a State to exclude certain classes from jury service.

Third. If there be a class favored by the statute, as claimed by plaintiff in error, it is not an arbitrary class.

In Bachtel *vs.* Wilson, 204 U. S., 41, Mr. Justice Brewer said:

> "The power of a State legislature to select certain individuals for the operation of a statute is not an arbitrary power, one that it can exercise without regard to any principle of classification. And yet there is a power of selection. The Fourteenth Amendment was not designed to prevent all exercise of judgment by a State legislature of what the interests of the State require, and to compel it to run all its laws in the channels of general legislation. In short, the selection in order to become obnoxious to the Fourteenth Amendment, must be arbitrary and unreasonable, not merely passively, but clearly and actually so."

Mr. Justice Bradley, in Lewis *vs.* Missouri, 101 U. S., 22, said:

> "The general objects and purposes of the Fourteenth Amendment are to extend United States citizenship to all natives and naturalized persons, and to prohibit the State from abridging their privileges or immunities, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. The amendment could never have been intended to prevent a State from arranging and parceling out the jurisdictions of its several courts at its discretion. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.
>
> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provisions."

In Brown *vs.* State, 175 U. S., 175, Mr. Justice Brewer said:

> "The State has full control over the proceedings in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities may exist in these respects in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State pre-

scribes its mode of judicial proceeding. The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitation heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at common law an indictment by the grand jury was an essential preliminary to trial, it is within the power of a State to abolish the grand jury and proceed by information. In providing for a trial by a struck jury empanelled in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. The accused cannot complain if he is still tried by an impartial jury. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained."

In West *vs.* Louisiana, 194 U. S., 263, Mr. Justice Peckham said:

"The State of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations. If, through its court it erred in deciding what the common law was, yet if no fundamental and absolutely all-important right were thereby denied to an accused, he still had due process of law, and could not complain to this court in regard to the error, assuming of course, that the decision did not conflict with some specific provision of the Federal Constitution. The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

In conclusion, the effect of the New Jersey law is to make the return of the sheriff found in the record conclusive that he "duly summoned twenty-four good, lawful men, qualified by law to serve."

In Howard *vs.* Kentucky, 200 U. S., 175, it was held the statute of Kentucky which forbade reversal of a trial judge's ruling upon the competency of a juror was constitutional.

In the cases cited by the plaintiff in error it is enough to say that only in those cases in which the State court has denied the prisoner some "fundamental right," as was done in Carter *vs.* Texas, 177 U. S., 422, 447, has this court reversed the State court in a criminal case.

Crowley *vs.* United States, 194 U. S., 461, does not control this case, for that case establishes the law in the courts of the United States, but it is not binding upon the States and is in opposition to the common law as expounded in New Jersey by Chief Justice Beasley.

Our statute has so much public utility to commend it to favor that I feel confident it does not lack support in the Constitution.

Respectfully submitted,

GEORGE BERDINE,

Prosecutor of the Pleas of Middlesex County.